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No. 02-

IN THE

Supreme Court of the United States

IN RE PHILADELPHIA NEWSPAPERS, INC.:

PHILADELPHIA NEWSPAPERS, INC.,
Petitioner,

v.

NEW JERSEY AND FRED NEULANDER,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an order barring the press from contacting or attempting to interview discharged jurors—for any reason, regarding any subject, and regardless of whether the juror voluntarily initiates such contact—based solely on speculation concerning advantages that publication of juror remarks might confer on the prosecution on a retrial, abridges the freedom of the press in violation of the First and Fourteenth Amendments to the United States Constitution.

RULE 29.6 STATEMENT

Philadelphia Newspapers, Inc., is a wholly owned subsidiary of Knight Ridder, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Philadelphia Newspapers, Inc., as publisher of *The Philadelphia Inquirer*, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The order of the Supreme Court of New Jersey (Pet. App. 1a-4a) is not reported. The opinion of the Supreme Court of New Jersey (Pet. App. 5a-48a), supporting its prior order, is reported at 173 N.J. 193, 801 A.2d 255 (2002). The court's order denying reconsideration (Pet. App. 49a) is not reported. The opinion of the Superior Court of New Jersey, Appellate Division (Pet. App. 51a-56a) is not reported. The relevant orders of the Superior Court of New Jersey, Law Division (Pet. App. 57a-64a) are not reported. The transcripts of the oral rulings by the Superior Court, Law Division on petitioner's motions have been reproduced as Appendices H and I to this petition (Pet. App. 65a-72a).

JURISDICTION

The opinion of the New Jersey Supreme Court was issued on July 18, 2002. The court denied Philadelphia Newspapers' motion for reconsideration on September 18, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Speech and Press Clauses of the First Amendment to the United States Constitution provide: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. The Sixth Amendment, as relevant, provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI. The Due Process Clause of the Fourteenth Amendment provides: "No state shall . . . deprive any person of life, liberty, or property,

without due process of law . . . ." U.S. Const. amend. XIV § 1.

STATEMENT OF THE CASE

This case involves an expansive prior restraint on the press based solely on highly dubious speculation about possible effects that publication of discharged jurors' comments might have on a capital defendant's right to a fair retrial. The court order at issue remained in effect for more than a year after a mistrial was declared in the defendant's first trial. As affirmed and expanded by the Supreme Court of New Jersey, the order barred the press from contacting or attempting to interview discharged jurors for any reason, regarding any subject, and even if the juror initiated such contact. In the view of that court, this prior restraint complied with the First Amendment because any publication of jurors' remarks that might have followed a press interview, if read by prosecutors, "might" have conferred an unfair advantage on the State in the retrial of this capital case.

The decision of the New Jersey Supreme Court, upholding a prior restraint for the slimmest and most speculative of reasons, represents a new extreme on the spectrum of judicial opinion in this area, and reflects significant confusion in the lower courts concerning the permissibility of restraints on press interviews of discharged jurors. If permitted to stand, it threatens serious dilution of important First Amendment protections established in prior decisions of this Court—protections which serve not only an informed citizenry but also the integrity of the judicial process itself. The case therefore presents an important opportunity for this Court to clarify the extent of a trial court's authority to restrain the press.

1. In June 2000, a grand jury for Camden County, New Jersey indicted Fred Neulander, a former rabbi at one of the largest synagogues in South New Jersey, for murder, felony murder, and conspiracy in connection with the November

1994 death of his wife. The prosecutor sought the death penalty. Pet. App. 6a.

The proceedings attracted widespread, intensive public attention. Media interest, as a result, was significant. For example, the CourtTV network applied to televise the trial. In light of the heightened public interest, on July 18, 2001, the Superior Court met with press representatives and issued an order governing media coverage. The court permitted live television coverage. Pet. App. 7a. Two provisions of the court's order, however, directly restricted the ability of the press to gather and publish news. Paragraph 13 of the order stated: "Neither the identity nor descriptions that would reasonably identify any juror may be publicized, in any way, unless authorized by further Order of this Court." *Id.* at 60a. Paragraph 15 provided: "Media representatives shall not contact or attempt to interview any juror or potential juror." *Id.* Paragraph 15, as later modified by the trial court and state supreme court, is the subject of the present certiorari petition.

Prior to trial, petitioner Philadelphia Newspapers, Inc. ("Philadelphia Newspapers"), publisher of *The Philadelphia Inquirer*, and The Associated Press moved to vacate paragraph 13, and to modify paragraph 15 to clarify that it would expire upon discharge of the jury. The trial court denied the motion. Pet. App. 61a-62a. Acknowledging that interviews of discharged jurors presented an issue different than interviews conducted during trial, the court modified paragraph 15 as follows: "Media representatives shall not contact or attempt to interview any juror or potential juror; however, subsequent to entry of the verdict in this case petitioners may apply to this court for relaxation of the provisions of this paragraph." *Id.* The court also refused to modify paragraph 13.[1] Philadelphia Newspapers and The

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[1] Although recognizing that the media had attended voir dire proceedings in which jurors' names had been made public, the court

Associated Press filed an emergency appeal with the Appellate Division, but that court denied leave for the appeal. *Id.* at 8a.

Trial testimony commenced on October 15, 2001, and ended on November 2, 2001. Extensive media coverage accompanied virtually all aspects of the trial. CourtTV provided gavel-to-gavel coverage of the entire trial, commentators analyzed the strengths and weaknesses of both sides' cases as the trial progressed, and news stories and other trial-related information were gathered and published on a number of Internet sites. Pet. App. 8a, 42a-43a. After lengthy deliberations, the jury was unable to return a verdict. The court declared a mistrial and discharged the jury on November 13, 2001. *Id.* at 8a.

Once the court discharged the jurors, Philadelphia Newspapers and several other media organizations moved immediately to vacate paragraphs 13 and 15 of the court's media order. Philadelphia Newspapers argued that paragraph 15 violated the First Amendment. The court denied the motions, noting broadly that whenever jurors believe that they may be contacted after trial, their awareness may negatively affect jury deliberations:

> [I]f there were to be a relaxation of either of these two provisions it has the capacity to undermine or weaken [Neulander's] right to a fair trial .... [J]urors who are summoned for possible jury service, whether it be in this county or in another county, will know that they run the risk of having their names published and they run the risk of

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believed a ban on publishing juror names was necessary to protect Neulander's right to a fair trial: "[I]f a juror knows that his name will be published or if someone tells him that another name was published, ... we will not ever receive the types of honest answers during voir dire that Fred Neulander is constitutionally entitled to receive." Pet. App. 66a-67a.

> having their private deliberations in the jury room discussed, analyzed, broadcast, or in other ways disseminated . . . . [T]hose things do have the capacity to chill the free exchange of ideas in the jury room and will also have the capacity to restrict the jury pool that is available for this case.

Pet. App. 72a. The Superior Court entered an order formally clarifying that paragraphs 13 and 15 remained in full force and effect. *Id.* at 63a-64a. Philadelphia Newspapers appealed immediately. The Superior Court then sent a letter to the Appellate Division (*id.* at 73a-75a) amplifying the reasons for its denial of the relief sought by the media. *See* N.J. Ct. R. 2:5-1(b). The court explained its belief that after the conclusion of the trial the media had violated the court order by, *inter alia*, broadcasting footage of the jurors leaving the courthouse and attempting to contact discharged jurors. The court also noted that *The Philadelphia Inquirer* had published the name of the jury forewoman, in an article questioning whether she resided in New Jersey.

2. The Appellate Division affirmed in a per curiam opinion, acknowledging the important First Amendment right at issue but finding that interviews with discharged jurors and publication of their names "would pose a clear and present danger to defendant's right to a fair trial." Pet. App. 52a. Specifically, notwithstanding the blanket television coverage of the first trial, the Appellate Division feared that "disclosure of the deliberations of the discharged jury would have a significant capacity to contaminate the future jury pool." *Id.* at 55a. The court concluded that less-restrictive measures—including change of venue and careful voir dire—would not sufficiently "insulate a future jury from the contaminating effect of the publication of the deliberations of the discharged jury." *Id.*

3. Philadelphia Newspapers appealed to the New Jersey Supreme Court. On April 22, 2002, that court released a brief order vacating in part, affirming in part, and modifying

the Superior Court media order. Pet. App. 1a-4a. Although the court vacated paragraph 13 in pertinent part, it affirmed and actually expanded paragraph 15 to provide "that the prohibitions ... shall apply as well to communications between the media and jurors, including discharged jurors, that might otherwise be initiated by jurors." *Id.* at 2a.[2]

The Supreme Court of New Jersey explained the basis for its order in a published opinion issued on July 18, 2002. Pet. App. 5a-48a. The court rejected the various rationales for paragraph 15 proffered by the courts below. It recognized that the trial court's fear of juror interviews chilling the free exchange of ideas by the retrial jurors was simply "too speculative" to support a prior restraint on the press. *Id.* at 33a. It also concluded that, with or without press interviews of discharged jurors, "the passage of time and the trial court's determination to change the venue for retrial suggest that the task of empanelling an impartial jury will not be insurmountable." *Id.*

The court nevertheless upheld the ban, based upon a different interest: preventing the prosecution from obtaining an unfair advantage on retrial of a capital case. Observing "'that the penalty of death is different,'" (Pet. App. 33a (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976))), the court held that the prior restraint was justified by the

> specific concern ... that jurors submitting to media interviews *might* reveal some insight into the jury's deliberative process that would afford the prosecution a significant advantage at the retrial and thereby provide defendant with a *colorable Sixth*

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[2] The court also modified Paragraph 15 "to extend its application only until conclusion of the retrial and the return of the verdict." Pet. App. 2a. As we discuss below at p. 8, the ban has now expired. Mootness is no bar, however, because under long-established precedent of this Court in closely related contexts, the issue is capable of repetition yet evading review. *See infra* Part III.

> *Amendment issue for appeal* in the event of a conviction.

Pet. App. 34a (emphasis added). The New Jersey Supreme Court "infer[red]" that, if interviewed by the press, jurors would "likely" reveal their reactions to the trial evidence and "might" offer observations on the strengths and weaknesses of the prosecution's case. *Id.* at 34a. The court conceded that it was "unknown" whether such revelations, if any, would affect the prosecution or defense strategies at the retrial. *Id.* Nevertheless, the court concluded that "the risk that such disclosures could provide the prosecution with an undue advantage in the retrial proceeding is sufficiently substantial to persuade us that the safer course is to disallow the interviews despite the attendant limitation on the media's First Amendment interests." *Id.*

Justice Long and Chief Justice Poritz dissented. Pet. App. 38a-48a. They argued that the majority's concern about an unfair prosecutorial advantage on retrial was "nothing more than judicial speculation," *id.* at 42a, "so remote a possibility as to be illusory," *id.* at 48a. "The retrial will be an entirely new and distinct event, with both parties beginning on equal footing, with equal access to all information reported by the media." *Id.* Thus, the juror interviews did "not present 'the kind of threat to fair trial rights that . . . possess the requisite degree of certainty to justify restraint.'" *Id.* (quoting *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 569-70 (1976)). The dissent also faulted the majority for both the underinclusiveness and overbreadth of the order it affirmed. *Id.* at 43a-46a.

4. The New Jersey Supreme Court denied Philadelphia Newspapers' motion for reconsideration on September 18, 2002. Pet. App. 49a.

5. Meanwhile, as the appeal in this case wound its way through the courts, the Superior Court ordered four *Philadelphia Inquirer* reporters to show cause why they should not be held in contempt for naming the jury

forewoman in an article questioning whether her primary residence was in New Jersey, and for contacting or attempting to interview several jurors. In May 2002 the Superior Court held a trial on the contempt charges. The court found all four reporters in contempt for violating paragraph 13 of the Superior Court media order and three of the four in contempt for violating paragraph 15. Pet App. 97a. The court made the contempt findings with regard to paragraph 13 notwithstanding the fact that the New Jersey Supreme Court had in the interim held that paragraph unconstitutional; the court reasoned that "a citizen—even one exercising First Amendment rights—must obey an Order issued by a court of competent jurisdiction until such Order is declared, by the appropriate appellate tribunal, to be a nullity." *Id.* at 95a.[3]

6. The Neulander retrial commenced in September 2002. On November 20, 2002, the jury returned guilty verdicts on all three charges of the indictment. The jury failed to reach a unanimous decision at the penalty phase of the trial. The ban on press contact or interviews with discharged jurors has now expired by its own terms. Sentencing by the trial judge is scheduled for January 2003.

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[3] The court sentenced each of the reporters to 180 days in jail. The court suspended the jail sentence of one reporter entirely on the condition that he pay a $1,000 fine and comply with the trial court's media order. The court suspended the jail sentences of the remaining three reporters on the condition that they also pay a $1,000 fine each, comply with the trial court's media order, and participate in court-enforced community service. Pet. App. 99a-106a. These contempt citations are currently on appeal.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE NEW JERSEY SUPREME COURT CONTRAVENED WELL-ESTABLISHED PRECEDENT OF THIS COURT ON AN IMPORTANT FIRST AMENDMENT ISSUE, WARRANTING THIS COURT'S REVIEW.

The order affirmed and expanded by the New Jersey Supreme Court was broad in scope: it forbade the press, upon pain of contempt, from contacting or attempting to interview discharged jurors for any reason, regarding any subject, and regardless of whether the juror voluntarily initiated such contact. The court ratified the order specifically in order to restrain the press from publishing juror remarks concerning the first Neulander trial. And it did so for an admittedly speculative reason: the court conceded that it was unknown whether publication of jurors' reactions would affect the retrial, and it acknowledged the absence of any precedent to support the proposition that a prosecutor's mere knowledge of how discharged jurors reacted violates the fair trial rights of a defendant facing retrial. The imposition of a prior restraint—the most serious abridgement of the First Amendment freedom of the press—cannot be justified on this meager basis. Review by this Court is warranted to re-set clear lines in a constitutionally sensitive area that has increasingly confounded lower courts.

1. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976), is the only decision of this Court to address the constitutionality of a prior restraint on the press, like the one at issue here, "entered to protect a defendant's right to a fair and impartial jury." *Id.* at 556. In *Nebraska Press*, this Court recognized that imposition of prior restraints on publication of information about trials can injure the interests of justice as well as the constitutional interest in a free press: "'The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.'" *Id.* at 560 (quoting *Sheppard* v.

Maxwell, 384 U.S. 333, 350 (1966)). Accordingly, this Court ruled that "the protection against prior restraint should have particular force as applied to reporting of criminal proceedings." *Id.* at 559. Even when a defendant's right to a fair trial is at issue—as it was in the most direct way possible in *Nebraska Press*[4]—this Court declared that "barriers to prior restraint remain high and the presumption against its use continues intact." *Id.* at 570; *see also id.* at 561.

Nebraska Press established a general framework for deciding whether such restraints comport with the First Amendment. *First*, a court must examine "the nature and extent" of the asserted threat to the defendant's fair trial right. *Id.* at 562. The Court emphasized "the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied." *Id.* at 569. The press activity to be restrained must actually and certainly endanger the defendant's right to a fair trial. *See id.* at 569; *see also Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1070-71 (1991) ("The First Amendment protections of speech and press have been held . . . to require a showing of 'clear and present danger' that a malfunction in the criminal justice system will be caused before a State may prohibit media

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[4] In *Nebraska Press*, this Court reviewed a state court order that prohibited the press, until the impaneling of the jury, from reporting about the defendant's confessions or other facts strongly implicative of his guilt. *See* 427 U.S. at 545. The potentially countervailing Sixth Amendment interest appeared substantial. The defendant was charged with the murder of six family members in the course of a sexual assault. *See id.* at 542-43. "The crime immediately attracted widespread news coverage, by local, regional, and national newspapers, radio and television stations," *id.* at 542, and this Court found the state court "justified in concluding that there would be intense and pervasive pretrial publicity" that "might impair the defendant's right to a fair trial," *id.* at 562-63. Like Neulander, the defendant in *Nebraska Press* faced a potential death sentence if convicted. *See id.* at 546. Notwithstanding these facts, the Court held that the court order violated the First Amendment. *See id.* at 570.

speech or publication about a particular pending trial."). Speculative concerns simply are not sufficient to support a prior restraint: "the probability that [publication would deprive defendant of a fair trial] here was not demonstrated with the degree of certainty our cases on prior restraint require." *Nebraska Press*, 427 U.S. at 569; *see also id.* at 568-69 (acknowledging "risk" of prejudicial publicity, but finding it insufficiently severe).

Second, a court cannot assume that freedom of the press and the right to a fair trial are incompatible. Before imposing a prior restraint, a court must consider whether less-restrictive measures exist that would accommodate both constitutional interests. A prior restraint is not justified when a less-restrictive measure would protect a defendant's right to a fair trial. *See id.* at 562; *see also id.* at 563-64, 569. This Court concluded in *Nebraska Press* that the lower court's order failed this standard: "We cannot say on this record that alternatives to a prior restraint ... would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary." *Id.* at 569.

Third, a court must determine whether the prior restraint would actually prove effective "to prevent the threatened danger." *Id.* at 562. The order at issue in *Nebraska Press* also failed this requirement. *See id.* at 567.

2. The decision of the New Jersey Supreme Court threatens serious erosion of these principles. This Court explained in *Nebraska Press* that a prior restraint is "the most serious and the least tolerable infringement on First Amendment rights." 427 U.S. at 559. The order here that banned press contacts and interviews with discharged jurors was a prior restraint both (a) on communications between reporters and discharged jurors that are inextricably bound up with publication of the contents of such communications, and (b) on the right of the press to gather news, *see, e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665, 681, 707 (1972). Indeed, as the reasoning of the New Jersey Supreme Court made

clear, the entire *purpose* of the order was to restrict the potential publication by the press of jurors' reactions to the evidence presented at the first trial. In contrast to a subsequent punishment, reporters violating paragraph 15 would not have been afforded the normal panoply of protections including, most importantly, the availability of a full First Amendment defense to prosecution. *See Nebraska Press*, 427 U.S. at 559.[5] Like the prior restraint in *Nebraska Press*, the sanction of the order prohibiting media contacts with or interviews of discharged jurors was "immediate and irreversible," freezing speech for more than a year. *Id.*[6]

The New Jersey Supreme Court cited *Nebraska Press* but ignored its teachings. *First*, the court never even attempted to establish that "a fair trial w[ould] be denied" absent the prior restraint. Rather, the court's "specific concern" was solely that, if jurors submitted to press interviews, they "*might* reveal some insight into the jury's

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[5] For example, even after the New Jersey Supreme Court had found Paragraph 13 to be unconstitutional, four *Philadelphia Inquirer* reporters were held in contempt for violating that provision. *See* Pet. App. 95a-96a.

[6] The order did not constitute a mere restriction on the right of the public and press to "access" criminal trials or governmental information. *Cf. Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) ["*Press-Enterprise II*"]; *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984) ["*Press-Enterprise I*"]; *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982); *Pell* v. *Procunier*, 417 U.S. 817 (1974). The Court's "right of access" cases concern government fora or information to which the public as a whole is not granted access. This case involves the *opposite* context: the New Jersey courts made no effort to seal the jury deliberations off from the public generally (discharged jurors were free to discuss or publish their views or recollections of the trial as they saw fit) and proscribed contact only with the press. Thus, Philadelphia Newspapers does not seek "special access to information not shared by members of the public generally," *Pell*, 417 U.S. at 834; instead it desires to learn and publish information available to anyone else. Accordingly, the *Nebraska Press* doctrine and not the "right of access" cases is most pertinent here.

deliberative process that would afford the prosecution a significant advantage at the retrial and thereby provide defendant with a *colorable* Sixth Amendment issue for appeal in the event of a conviction." Pet. App. 34a (emphases added). This Court rejected similar speculation in *Nebraska Press*. The scope of restrictions on publication potentially validated by such an approach is limited only by the imagination of counsel and the courts in hypothesizing "colorable" Sixth Amendment claims.

The New Jersey Supreme Court cited no authority for the proposition that a prosecutor's mere knowledge of discharged jurors' thought processes violates a defendant's constitutional right to a fair retrial. To petitioner's knowledge, no authority exists for that proposition, especially when jurors' observations would be equally available to the defendant. A prosecutor does not gain any advantage at all—much less an *unfair* advantage—when the defendant learns the same thing at the same time. Indeed, even when the prosecution *suppresses* actual evidence, and thereby obtains an informational advantage over a defendant, the Court has not held that such conduct invariably violates the Due Process Clause. *See, e.g.*, *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). In short, the single concern articulated by the court below is a far cry from any fair-trial violation previously recognized by this Court. The New Jersey Supreme Court recognized the absence of authority for its position, and therefore described its decision essentially as a means to prevent novel Sixth Amendment claims from even arising on appeal: "[O]ur pragmatic understanding of and long experience in death penalty appellate litigation impel us to intervene in order to avoid Sixth Amendment issues that inevitably would be raised if we stayed our hand." Pet. App. 37a-38a.[7]

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[7] Even the New Jersey Supreme Court's own precedent appears to demonstrate that mere prosecutorial knowledge of a hung jury's

Thus, the New Jersey Supreme Court affirmed the order barring press contacts and interviews with discharged jurors in circumstances plainly lacking "the degree of certainty our cases on prior restraint require." *Nebraska Press*, 427 U.S. at 569. The court itself acknowledged that the purported threat it identified was far from certain. For example, the court speculated that discharged juror interviews "might" reveal information of significance, Pet. App. 34a; that if so there was only a "potential" that juror interviews would "afford[] the prosecution an inappropriate advantage in a retrial," *id.* at 34a; and that "[w]hether [juror interviews] significantly would have affected the retrial strategies of the prosecution and defense is unknown," *id.* This Court, however, has emphasized that a "clear and present danger" to a defendant's right to a fair trial must be identified before a prior restraint may be imposed on the press. *Gentile*, 50' U.S. at 1070-71; *Nebraska Press*, 427 U.S. at 569 (threat to defendant must be proven with requisite "degree of certainty"). The New Jersey court in effect reversed the presumption of *Nebraska Press*. Rather than presuming that prior restraints are unconstitutional and resorting to their imposition only upon a showing of true necessity, the court authorized a prior restraint based upon slight threats to the defendant's fair trial

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deliberations would not constitute a violation of a defendant's fair trial right. In *State* v. *Cruz*, 171 N.J. 419, 794 A.2d 165 (2002), a capital case, the trial court declared a mistrial after the jury was unable to reach a unanimous verdict on any charges. The trial judge then questioned the jury forewoman in open court regarding the jurors' votes on the various counts. *See id.* at 423-25, 794 A.2d at 168-69. In response to the court's questions, the forewoman described not only the vote breakdown, but also the jurors' general sentiments regarding the State's case. *See, e.g., id.* at 425, 794 A.2d at 169 ("Most of the people felt [the defendant] was present, but just didn't think there was enough evidence to substantiate his participation."). Notwithstanding the fact that the jury's reactions thereby became available to the prosecution, the New Jersey Supreme Court remanded the case for retrial. *Id.* at 434, 794 A.2d at 176.

right simply because it was "the safer course." Pet. App. 34a.[8]

Second, the New Jersey Supreme Court failed to consider obvious less-restrictive measures that would have addressed its concerns about Neulander's fair trial rights without a prior restraint or with a far narrower one. For example, even if (as seems unlikely) the prosecution might have secured some unfair advantage by reading general news reports about the first trial, the court could have ordered the prosecuting team to screen itself from all post-trial press coverage pertaining to the jury deliberations. *Cf. United States* v. *Poindexter*, 698 F. Supp. 300, 312-13 (D.D.C.) (recounting scrupulous efforts of Iran-Contra Independent Counsel prosecution team to avoid exposure to immunized congressional testimony of Oliver North), *appeal dismissed by*, 859 F.2d 216 (D.C. Cir. 1988). This would have eliminated entirely any risk of "unfair advantage."

Moreover, even if some restraint were appropriate to address the court's concern—and it was not—the order prohibited the press from contacting jurors *at all* or interviewing them about *any* subject, even if totally unrelated to the Neulander trial or even jury duty more generally. Less-restrictive measures plainly existed to address the court's stated concern. For example, the New Jersey Supreme Court could have limited paragraph 15 to proscribe only interviews with the discharged jurors that concerned the details of their deliberations in the first trial. *See, e.g., In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990) ("Although the district judge here assumed that the Globe

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[8] That Neulander faced a capital sentence does not change matters: the defendant in *Nebraska Press* was in the same position. *See* 427 U.S. at 546. It simply does not follow that a prosecutor's awareness of a hung jury's observations—if such awareness could even be termed unfair—is more unfair to a defendant charged with a capital crime than to any other defendant.

sought access solely to inquire into the deliberative process, other avenues of inquiry are conceivable. Juror bias or confusion might be uncovered, and jurors' understanding and response to judicial proceedings could be investigated."). In this case, *Philadelphia Inquirer* reporters pursued just such an alternative subject—whether the jury forewoman was in fact a resident of Pennsylvania. *See supra*, p. 5. The sweeping restraint affirmed and expanded by the New Jersey Supreme Court thus proscribed a broad swath of legitimate inquiry and speech with no relation to the court's articulated Sixth Amendment concern. Yet the court made no specific findings regarding the availability of less-restrictive measures. *Cf. Nebraska Press*, 427 U.S. at 563-65.

Third, the New Jersey Supreme Court failed to acknowledge that the prior restraint was unlikely to serve the purported interest in sealing off prosecutors' access to information about the first jury's deliberations. The order left discharged jurors free to discuss their deliberations with everyone *except* representatives of the media—leaving the press free to ascertain, and report on, the jurors' reactions to the trial through third parties.[9] The order also left jurors free to broadcast their observations to the public via book, Internet, or other means.[10] And the utility of any juror

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[9] This was no mere hypothetical issue. The *Philadelphia Inquirer* published an article describing reactions of the first Neulander jury based on statements from "a person who spoke to one of the jurors." Joseph A. Gambardello et al., *Rabbi Juror: "We All Saw It A Totally Different Way,"* Philadelphia Inquirer, Nov. 16, 2001, at A1, *available at* 2001 WL 29265198.

[10] *See, e.g.*, D. Graham Burnett, *A Trial By Jury* (2002) (describing author's experience as jury foreman in New York City murder trial); Elizabeth Amon, *When Jurors Decide to Write Books: Andersen Trial Raises Questions About Impact on Deliberations*, Nat'l L.J., July 8, 2002, at A6; Dave Winer, *Jury Duty*, DaveNet, Mar. 1, 1996, *at* http://davenet.userland.com/1996/03/01/juryduty (personal Internet weblog entry describing author's service on a jury, including jury deliberations).

interview ban was questionable given the substantial press coverage the trial had attracted. As the dissent pointed out: "Simply stated, no aspect of this case has escaped public discourse. Thus, it is extremely unlikely that any comments made by former jurors would give even a crumb of new insight to a moderately competent prosecutorial team." Pet. App. 43a (Long, J., dissenting).

In sum, the New Jersey Supreme Court upheld and expanded an order barring the press from contacting or attempting to interview discharged jurors based on frankly speculative concerns, without considering obvious less-restrictive alternatives, and despite strong reason to doubt that the prior restraint would meaningfully address the court's stated Sixth Amendment concerns. The nature and magnitude of the error here make this case especially deserving of review. As members of this Court have noted in describing the unique problems associated with prior restraints on the press, "given the significant financial disincentives, particularly on the smaller organs of the media, to challenge any restrictive orders once they are imposed by trial judges, there is the distinct possibility that many erroneous impositions would remain uncorrected." *Nebraska Press*, 427 U.S. at 610-11 (Brennan, J., concurring in the judgment) (footnotes omitted).

II. THE DECISION OF THE NEW JERSEY SUPREME COURT IS IN SEVERE TENSION WITH LEADING DECISIONS OF FEDERAL COURTS OF APPEALS AND AT LEAST ONE STATE HIGH COURT.

A. There Is Confusion Regarding the Permissibility and Scope of Orders Restraining the Press from Interviewing Discharged Jurors.

As discussed above, this Court has decided only one case involving the constitutionality of a prior restraint imposed to protect a defendant's fair trial rights, and that

case is more than 26 years old. *See Nebraska Press*, 427 U.S. 539.[11] The Court has never examined the First Amendment implications of court orders restraining the ability of the press to contact and interview discharged jurors. In this void, the lower courts have diverged significantly on the constitutional permissibility of various kinds of restraints on juror interviews. The decision below in the present case represents a new extreme on that spectrum and warrants this Court's review.

The New Jersey Supreme Court's ruling is in serious tension with decisions of the federal courts of appeals for the Fifth, Ninth, and Tenth Circuits, and a decision of the Supreme Court of Ohio, all of which have held unconstitutional prior restraints of comparable breadth. In *United States* v. *Sherman*, 581 F.2d 1358 (9th Cir. 1978), for example, the Ninth Circuit vacated an order barring all persons, including the media, from contacting discharged jurors in a criminal case. Because the order imposed a restraint on the media's right to gather news prior to any attempt to contact the jurors, the Ninth Circuit subjected the order to the First Amendment's "heavy presumption against . . . constitutional validity" applicable to prior restraints. *Id.* at 1361. The Ninth Circuit found no countervailing Sixth Amendment interest because the trial had ended, and noted the clear availability of less-restrictive alternatives. *Id.* "A juror may speak or remain silent as he desires," the court explained. "The district court's order, by depriving the

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[11] Outside the prior restraint context, this Court has not considered the interplay between the First Amendment guarantee of freedom of the press and the defendant's right to a fair trial in more than nine years. *See El Vocero de Puerto Rico* v. *Puerto Rico*, 508 U.S. 147 (1993) (*per curiam*) (reversing without oral argument lower court decision due to conflict with *Press-Enterprise II*, 478 U.S. 1 (1986)). The Court decided a case involving the Free Speech Clause of the First Amendment and the right to a fair trial approximately eleven years ago in *Gentile*, 501 U.S. 1030 (1991).

media of the opportunity to ask the jurors if they wished to be interviewed, was clearly erroneous as a matter of law." *Id.* at 1362.

In *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982), a newspaper and one of its reporters challenged a local court rule forbidding any person to interview any juror concerning the deliberations or verdict of the jury except on leave of court granted upon good cause shown. Relying in part on *Sherman*, the Fifth Circuit held the rule unconstitutional under the First Amendment as applied to the media plaintiffs because it had not been tailored to prevent a substantial threat to the administration of justice. The court noted that the rule "appl[ied] equally to jurors willing and anxious to speak and to jurors desiring privacy, forbidding both courteous as well as uncivil communications, and foreclosing questions about a juror's general reactions as well as specific questions about other jurors' votes that might, under at least some circumstances, be inappropriate." *Id.* at 810. The court added that "[a]bsent good cause for restraint, petit jurors are free to discuss their service if they choose to do so." *Id.*

In *Journal Publishing Co.* v. *Mechem*, 801 F.2d 1233 (10th Cir. 1986), the Tenth Circuit vacated an order prohibiting the press from contacting discharged jurors in a civil case. The court applied the presumption that prior restraints violate the First Amendment and then vacated the order as "impermissibly overbroad. . . . [T]he court could not issue a sweeping restraint forbidding all contact between the press and former jurors without a compelling reason." *Id.* at 1236-37; *see also United States* v. *Dempsey*, 830 F.2d 1084, 1089 (10th Cir. 1987) ("There is no strict secrecy rule; jurors are not prohibited by law from discussing their deliberation after the case is over. Absent good cause for restraint, jurors are free to discuss their service as they choose." (citing *In re Express-News Corp.*, 695 F.2d at 810)).

The Supreme Court of Ohio, in a capital case, also has held unconstitutional a broad order similar to that upheld by the New Jersey Supreme Court in the present case. In *State ex rel. Cincinnati Post* v. *Court of Common Pleas*, 59 Ohio St. 3d 103, 570 N.E.2d 1101 (1991), the court decided that a trial court order barring contact with discharged jurors violated the First Amendment. Relying on *Sherman*, *In re Express News Corp.*, and *Journal Publishing Co.*, the Ohio Supreme Court found the order overbroad for at least two reasons. First, the order did not permit jurors to choose voluntarily to speak to others about the case. *Id.* at 105, 570 N.E.2d at 1103. Second, the order restrained more speech than necessary to protect the proffered interest of freedom of debate in the jury room: "[The] order would prohibit a juror from waiving the confidentiality of even his own votes and opinions. Such a 'categorical denial of all access,' not tailored to the objectives cited to justify it, violates the First Amendment." *Id.* at 106, 570 N.E.2d at 1104 (quoting *In re Express-News Corp.*, 695 F.2d at 811).

The decisions of other lower federal and state courts are also in significant tension with the New Jersey Supreme Court's opinion. *See United States* v. *Franklin*, 546 F. Supp. 1133, 1144-45 (N.D. Ind. 1982) (order barring media contact with discharged jurors conflicts with First Amendment); *Contra Costa Newspapers, Inc.* v. *Superior Court*, 72 Cal. Rptr. 2d 69, 72-73 (Ct. App. 1998) (order barring media contact with discharged jurors is unconstitutional prior restraint); *Sentinel Communications Co.* v. *Watson*, 615 So. 2d 768, 773-74 (Fla. Dist. Ct. App. 1993) (order barring media contact with discharged jurors in capital case is unconstitutional prior restraint; case decided while defendant's motion for new trial was still pending). The Sixth Circuit has indicated in dicta that it likely would strike under the First Amendment an order barring discharged

jurors from talking to the media. *See In re Memphis Publishing Co.*, 887 F.2d 646, 649 (6th Cir. 1989).[12]

On the other hand, some courts have upheld limited restrictions on press contact with discharged jurors, though none so sweeping as the order here. For example, the Third Circuit in *United States* v. *Antar*, 38 F.3d 1348 (1994), upheld an order that barred the press from inquiring into the specific votes, statements, opinions, or other comments of any juror during deliberations other than the juror being interviewed. *Id.* at 1363. It based its holding on recognition of the "concern[] about the potential negative effect of disclosures by former jurors upon the freedom and candor of deliberations in future cases." *Id.*[13] In the same case,

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[12] The Judiciary/Media Steering Committee of the Supreme Judicial Court of Massachusetts has issued nonbinding guidelines to Massachusetts judges. Those guidelines call into question, at least in Massachusetts, the propriety of the broad order affirmed and modified by the New Jersey Supreme Court in this case. The guidelines also highlight the continuing uncertainty in this area of the law. *See* Supreme Judicial Court of Massachusetts Judiciary/Media Steering Committee, *Guidelines on the Public's Right of Access to Judicial Proceedings and Records* (2000), *at* http://www.state.ma.us/courts/courtsandjudges/courts/supremejudicialcourt/pubaccesstoc.html. Regarding orders barring the press from interviewing discharged jurors, the guidelines provide the following instruction: "Post-trial, unless the standard set out in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976), can be met, judges should not forbid the media from speaking with jurors nor forbid jurors from speaking with the media. It remains unresolved to what extent, if at all, a judge may limit the scope of a reporter's post-trial inquiry into jury deliberations." *Id.* at § IV.E (footnotes omitted).

[13] The Third Circuit cited the *Handbook for Trial Jurors Serving in the United States District Courts* in its discussion. Generally, the *Handbook* recommends permitting jurors to decide themselves whether to grant interviews after the trial. The *Handbook* also provides, though, that "the court may enter an order *in a specific case* that during any . . . interview, jurors may not give any information with respect to the vote of any other juror." *Handbook*, *at* http://www.dcd.uscourts.gov/juryhandbook.html (emphasis added).

however, the court held unconstitutional portions of the same order barring the press from either making repeated contacts with discharged jurors or attempting to resume interviews after a juror expressed a desire to conclude an interview. *Id.* at 1364. Although recognizing a court's power to prevent harassment of jurors, the Third Circuit held that the threat of such harassment must be more than hypothetical. *Id.* at 1363.

Similarly, in three cases decided after *Express News Corp.*, the Fifth Circuit has upheld orders imposing limited restrictions on the ability of the press to interview discharged jurors. *See United States* v. *Brown*, 250 F.3d 907 (5th Cir. 2001); *United States* v. *Cleveland*, 128 F.3d 267 (5th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998); *United States* v. *Harrelson*, 713 F.2d 1114 (5th Cir. 1983), *cert. denied*, 465 U.S. 1041 (1984). The court articulated several bases for imposition of limited orders barring press interviews of discharged jurors. For example, in *Harrelson*, the Fifth Circuit held that "jurors, even after completing their service, are entitled to privacy and to protection against harassment." 713 F.2d at 1116; *see also Brown*, 250 F.3d at 918, 921. Citing this Court's juror privilege decision in *Clark* v. *United States*, 289 U.S. 1, 13 (1933), the Fifth Circuit also recognized an interest in protecting the freedom of debate in the jury room. *Cleveland*, 128 F.3d at 270; *Harrelson*, 713 F.2d at 1118. The orders at issue in these three cases, however—unlike the order here—permitted the press to pursue interviews initiated by jurors and barred inquiry only into actual jury deliberations. *See Brown*, 250 F.3d at 912; *Cleveland*, 128 F.3d at 269; *Harrelson*, 713 F.2d at 1116. In each case, those important limitations, absent here, were critical to the Fifth Circuit's decision to uphold the particular order against First Amendment challenge. *See Brown*, 250 F.3d at 920-21; *Cleveland*, 128 F.3d at 270; *Harrelson*, 713 F.2d at 1118.

The decisions of the Third and Fifth Circuits support the ruling of the New Jersey Supreme Court only to the extent

that it proscribed interviews of discharged jurors, initiated by the press, regarding the actual deliberations of the jury. The New Jersey order would nevertheless be questionable in the Third and Fifth Circuits because it bans inquiry into any and all subjects, and even when the juror initiates the contact.

B. This Case Presents an Important Opportunity for this Court to Clarify the Appropriate Balance Between the Competing Interests in this Area.

As the Third Circuit observed in *Antar*, "[t]he issue of media access to jurors is a subject of vigorous debate," and "there is substantial debate about the value of post-verdict interviews." 38 F.3d at 1357, 1363.[14] Courts and commentators have recognized that media interviews of discharged jurors serve several important values, including educating the public about the jury's case-specific decision and the obligations of jury duty more generally, enhancing public confidence in the judicial system, and protecting against improper conduct in the jury process. *See, e.g.*, Iversen, *supra*, at 523-24; *United States* v. *Posner*, 644 F. Supp. 885, 886 n.2 (S.D. Fla. 1986) (juror misconduct warranting new trial uncovered by newspaper reporters), *aff'd sub nom. United States* v. *Scharrer*, 828 F.2d 773 (11th Cir. 1987). As the First Circuit observed in a related context, juror information "serves to educate the public regarding the

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[14] Numerous commentators have entered the debate as well. *See, e.g.*, Abraham S. Goldstein, *Jury Secrecy & the Media: The Problem of Postverdict Interviews*, 1993 U. Ill. L. Rev. 295; Nancy S. Marder, *Deliberations & Disclosures: A Study of Post-verdict Interviews of Jurors*, 82 Iowa L. Rev. 465 (1997); David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints & Policy Options*, 70 Temp. L. Rev. 1 (1997); Copernicus T. Gaza, Note, *Getting Inside the Jury's Head: Media Access to Jurors After the Trial*, 12 N.Y.L. Sch. J. Hum. Rts. 311 (1995); Christine J. Iversen, Comment, *Post-verdict Interviews: The Key to Understanding the Decision Behind the Verdict*, 30 J. Marshall L. Rev. 507 (1997); Note, *Public Disclosures of Jury Deliberations*, 96 Harv. L. Rev. 886 (1983).

judicial system and can be important to public debate about its strengths, flaws and means to improve it." *Globe Newspaper Co.*, 920 F.2d at 94. In this respect, post-verdict juror interviews are a particular manifestation of the public scrutiny of criminal trials often praised by this Court. *See, e.g., Globe Newspaper Co.*, 457 U.S. at 606.

The decision by the New Jersey Supreme Court heightens the uncertainty in this constitutionally sensitive area. Its reasoning is in severe tension with the reasoning of all other significant rulings regarding the permissible breadth of restraints on press contact with discharged jurors. And it breaks dangerous new ground in holding that an interest as speculative as that advanced below could justify a prior restraint on the press in this or any context.

This Court has recognized that the law in this area is best developed through application of broad, guiding First Amendment principles to particular factual situations. In *Nebraska Press*, 427 U.S. at 569, the Court observed:

> Of necessity our holding is confined to the record before us. But our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied. The practical problems of managing and enforcing restrictive orders will always be present. In this sense, the record now before us is illustrative rather than exceptional.

As in *Nebraska Press*, the record here provides a good vehicle for clarifying the law in this area. At various stages of review, the New Jersey courts have relied on almost every conceivable rationale for sustaining the prior restraint. Thus, the record permits this Court to consider both longstanding arguments that have been debated in the various decisions in the lower courts across the country as well as the

unprecedented justification adopted by the New Jersey Supreme Court. In any event, the decision squarely implicates the critical First Amendment principles that threats to fair trial rights must be imminent and non-speculative, and that the prior restraint must be tailored as narrowly as possible to avert the threat. Review here would permit the Court to reestablish the core principle that prior restraints on the press are presumptively invalid, and subject to a very high burden of justification, even when imposed by courts to advance perceived interests of the judicial process.

It is important that this Court review the judgment of the New Jersey Supreme Court now, before its harmful precedential effects become more widespread. To petitioner's knowledge, since the *Neulander* decision at least one other New Jersey trial court has imposed a similar order barring press contact with discharged jurors.[15] And the high public profile of this case will likely afford the New Jersey Supreme Court's decision disproportionate impact nationwide. Even prior to the opinion below, reports indicated that restraints on contact between the press and discharged jurors had become increasingly commonplace around the nation.[16] Review now by this Court would

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[15] *See State* v. *Powell*, No. 01-04-170-I (N.J. Super. Ct. Aug. 9, 2002) (Pet. App. 111a-112a) (announcing order barring contact between press and discharged jurors in non-capital case involving charges of manslaughter, vehicular homicide, and aggravated assault when first trial resulted in mistrial on two charges); *see also* Lisa Teachey, *Court Orders Alarm Media Legal Experts*, Houston Chronicle, Nov. 20, 2002, at 27, *available at* 2002 WL 23239458 (describing recent order by Texas trial court barring reporters from conducting post-verdict interviews of jurors).

[16] *See, e.g.*, *Court Rejects Bid Against Ban on Contacting Jurors*, San Antonio Express-News, Sept. 26, 2001, at 2B, *available at* 2001 WL 26840574 (describing unpublished Fifth Circuit order affirming district court ban on unsolicited contact with discharged jurors in civil case); Ashley Gauthier, *Two Courts Bar Juror Contact*, News Media & L., Oct. 1, 2001, at 46, *available at* 2001 WL 18209346 (describing above Fifth Circuit order and Texas state trial court order in Andrea Yates case

eliminate "the distinct possibility that many erroneous impositions would remain uncorrected." *Nebraska Press*, 427 U.S. at 611 (Brennan, J., concurring in the judgment).

III. This Case Is Not Moot Because the First Amendment Issue Is Susceptible of Repetition Yet Evading Review.

The court order in this case barring the press from contacting or attempting to interview the discharged jurors has expired by its own terms. The case is not moot, however, because the issue presented is manifestly capable of repetition yet evading review. This Court has on numerous occasions considered First Amendment challenges to similar orders imposed during criminal trials. In each case, the Court found no jurisdictional obstacle to considering and deciding the case because, although the particular restraint had expired by the time the case reached this Court, the controversy was capable of repetition yet evading review. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 6 (order temporarily refusing access to transcript of preliminary hearing); *Globe Newspaper*, 457 U.S. at 602-03 (order denying access to criminal trial involving minor victims of sexual offenses); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 563 (1980) (order denying access to criminal trial); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377-78 (1979) (order denying access to pretrial hearing in criminal case); *Nebraska Press*, 427 U.S. at 546-47.

This Court has held that two factors make orders like the one at issue here capable of repetition yet evading review. First, it is reasonably foreseeable that the petitioners, members of the press in the relevant jurisdictions of the

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barring press from interviewing jurors from competency proceeding until conclusion of later-conducted trial); Melissa Grace, *Jurors Let Verdict Speak for Itself*, Times Union (Albany), Feb. 26, 2000, at A5, *available at* 2000 WL 6732447 (describing judge's order in Amadou Diallo case barring press from contacting discharged jurors or alternate jurors).

challenged restrictions, will be subjected to similar orders in the future. *See, e.g.*, *Gannett*, 443 U.S. at 377-78. Second, because orders whose duration depends on the length of a criminal trial are by their nature short-lived, it is a virtual certainty that any future orders would expire before plenary review could be conducted by this Court. *See, e.g.*, *Globe Newspaper*, 457 U.S. at 603. Both principles have become so well-accepted that in *Press-Enterprise II* this Court disposed of the mootness issue in one short paragraph. *See* 478 U.S. at 6. They apply with particular force here. Mootness, accordingly, provides no obstacle to review of the First Amendment issue in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. Alternatively, the Court may wish to consider summary disposition.

Respectfully submitted,

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DECEMBER 2002

APPENDIX A

SUPREME COURT OF NEW JERSEY

A-67 September Term 2001
52,353
[Filed Apr. 22, 2002]

STATE OF NEW JERSEY,
Plaintiff,

v.

FRED NEULANDER,
Defendant-Respondent.

IN RE APPLICATION OF
PHILADELPHIA NEWSPAPERS, INC.,
Intervenor-Appellant.

ORDER

This matter having come before the Court on a grant of leave to appeal from the Superior Court, Appellate Division's affirmance of interlocutory orders entered by the trial court on July 18, 2001, August 31, 2001, November 14, 2001, and November 16, 2001, which orders, *inter alia*, prohibited (1) the identification of any juror in any publication, and (2) all media representatives from contacting or attempting to interview any juror pending the entry of a verdict, at which time petitioners would be permitted to apply for a relaxation of the prohibition,

And the Court having reviewed the record, the briefs of the parties, and the oral argument of counsel,

And the Court having concluded that defendant's right to a retrial by a fair and impartial jury mandates that counsel should not receive pretrial insights into the juror deliberations from the first trial and that no less restrictive alternative than barring ju-

ror interviews until completion of the trial will achieve that objective, *see Press Enterprise Company v. Superior Court of California for County of Riverside*, 478 U.S. 1, 14, 106 S Ct. 2735, ____, 92 L.Ed.2d 1, 13-14 (1986),

And the Court having determined that the interests of justice require it to issue an Order disposition with opinions to follow in due course,

And good cause appearing;

IT IS ORDERED that the orders of the Superior Court, Law Division, are modified and affirmed, as follows:

1. Paragraph 13 of the order of July 18, 2001, is vacated to the extent that it restrains the use of juror identification information that is part of the public record of these proceedings; and

2. Paragraph 15 of the order of July 18, 2001, as modified by the trial court in the order of August 31, 2001, is further modified to extend its application only until conclusion of the retrial and the return of the verdict; provided, however, that the prohibitions imposed by said paragraph shall apply as well to communications between the media and jurors, including discharged jurors, that might otherwise be initiated by jurors.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 22nd day of April, 2002.

/s/ Stephen W. Townsend
Clerk of the Supreme Court

JUSTICES STEIN, COLEMAN, VERNIERO, LaVECCHIA, and ZAZZALI join in the Court's Order. CHIEF JUSTICE PORITZ and JUSTICE LONG concur in the majority's conclusions with respect to ¶13 of the July 18, 2001, order, but dissent from the remainder of the Court's order. They would hold that ¶15 constitutes a prior restraint in violation of the First Amendment to the United States Constitution and

would permit juror interviews by the media at the discretion of the juror. A change of venue, coupled with a searching voir dire of prospective jurors at defendant's retrial, in the view of the dissenting Justices, would provide a less restrictive alternative to the prohibitions in the Court's Order.

The foregoing is a true copy
of the original on file in my office.

/s/ Stephen W. Townsend
Clerk of the Supreme
Court of New Jersey

[attachment]

SUPREME COURT OF NEW JERSEY

SEPTEMBER TERM 2001, NO. A-67

ON APPEAL FROM APPELLATE DIVISION, SUPERIOR COURT
ON CERTIFICATION TO _____

STATE OF NEW JERSEY,
Plaintiff,

v.

FRED NEULANDER,
Defendant-Respondent.

IN RE APPLICATION OF
PHILADELPHIA NEWSPAPERS, INC.,
Intervenor-Appellant.

DECIDED April 22, 2000
Chief Justice Poritz PRESIDING

CHECKLIST	MODIFY AND AFFIRM	CONCUR IN PART/ DISSENT IN PART	
CHIEF JUSTICE PORITZ		X	
JUSTICE STEIN	X		
JUSTICE COLEMAN	X		
JUSTICE LONG		X	
JUSTICE VERNIERO	X		
JUSTICE LaVECCHIA	X		
JUSTICE ZAZZALI	X		
TOTALS	5	2	

APPENDIX B

SUPREME COURT OF NEW JERSEY

STATE OF NEW JERSEY,
Plaintiff,

v.

FRED NEULANDER,
Defendant-Respondent.

IN RE APPLICATION OF PHILADELPHIA NEWSPAPERS, INC.,
Intervenor-Respondent.

Argued March 25, 2002
Decided July 18, 2002

[801 A.2d 255]

[257] The opinion of the Court was delivered by STEIN,J.

The issue in this appeal, one of first impression, concerns the power of a court, following a hung jury in a capital murder trial that will result in defendant's imminent retrial for capital murder, to prohibit representatives of the press from attempting to conduct interviews of the jurors after the trial court declared a mistrial.

This issue requires the Court to resolve the apparent tension between interests protected by the First Amendment and by the Sixth Amendment to the United States Constitution. As the United States Supreme Court has emphasized: "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of the system is of crucial import to citizens concerned with the administration of government." *Nebraska Press Assn v. Stuart,* 427 U.S. 539,587, 96 S.Ct. 2791, 2816, 49 L.Ed.2d 683, 714 (1976) (Brennan, J., concurring). Of comparable magnitude,

the Sixth Amendment right "to a speedy and public trial, by an impartial jury," U.S. Const. amend. VI, has been characterized as "the most fundamental of all freedoms," *Estes v. Texas*, 381 U.S. 532, 540, 85 S.Ct. 1628, 1631, 14 L.Ed.2d 543, 549 (1965), and as "a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression," *Nebraska Press, supra*, 427 U.S. at 586, 96 S.Ct. at 2815, 49 L.Ed.2d at 713.

We granted the motion of Intervenor Philadelphia Newspapers, Inc. for leave to appeal, *R.* 2:2-1(a), from an unpublished opinion of the Appellate Division that affirmed interlocutory orders entered by the trial court that prohibited; (1) identification of any juror in any publication and (2) all media representatives from contacting or attempting to interview any juror pending entry of a verdict. By order entered April 22, 2002, this Court, 5-2, vacated paragraph 13 of the Law Division's order of July 18, 2001 (prohibiting identification of jurors) "to the extent that it restrains the use of juror identification information that is part of the public record of these proceedings," and also modified paragraph 15 of that order (prohibiting contact with or attempts to interview jurors) to "extend its application only until conclusion of [defendant's] retrial and the return of the verdict," and applying the prohibition imposed to communications between media and the jurors that are initiated by the jurors.

We now set forth at length the analytical basis for the Court's April 22, 2002 disposition.

I

Defendant, Fred Neulander, a former rabbi of one of the largest synagogues in southern New Jersey, was indicted by a Camden County grand jury and charged in a three-count indictment with murder, felony murder, and conspiracy in connection with the November 1994 death of his wife Carol. The Camden County Prosecutor filed a notice of aggravating factors and is seeking the death penalty.

Defendant's prosecution and trial have been the subject of intense media attention and widespread coverage, especially in southern New Jersey and the greater Philadelphia area. With the permission of the trial court, Court TV televised the entire trial.

Jury selection for defendant's trial commenced August 20, 2001. In anticipation of the extensive media coverage of the trial, the trial court on July 10, 2000 sent a **[258]** written invitation to various representatives of the print and broadcast media, and a wire service, to attend an informal conference with the court on July 18, 2001. (The invitation was widely disseminated, and included eighteen newspapers from New Jersey, Philadelphia, and New York, ten television news stations and five radio stations.) Following that informal conference the trial court issued on the same date its "Order Governing Media Coverage During Trial Proceedings," which imposed the two restrictions now at issue.

Paragraph 13 of the Order provides: "Neither the identity nor descriptions that would reasonably identify any juror may be publicized, in any way, unless authorized by further order of this Court."

Paragraph 15 of the Order provides: "Media representatives shall not contact or attempt to interview any juror or potential juror."

On August 16, 2001, four days before jury selection commenced, Philadelphia Newspapers, Inc. (PNI) and The Associated Press (AP), moved before the trial court to delete paragraph 13, and amend or modify paragraph 15 of the July 18, 2001 Order. The trial court scheduled argument on the motion for August 31, 2001.

When jury selection commenced on August 20, 2001, each juror was asked to complete a fifty-page questionnaire, the content of which was not released either to the public or the media. During the first juror *voir dire* proceeding the following day, attended by several media representatives, the first four jurors

were identified by name, placed under oath, and examined by counsel. Following that day's proceedings PNI filed an emergent motion seeking the court's consent to publication of "news reports that may identify or contain descriptions that may reasonably identify any jurors or potential jurors in this matter who were summoned or examined on August 20 and 21, 2001." The trial court also scheduled that motion for hearing on August 31, 2002. Prior to that hearing, the Appellate Division denied PNI's emergent application for leave to appeal the trial court's refusal to grant immediate relief.

On August 31, 2001, the trial court denied PNI's motion to vacate paragraph 13, but amended paragraph 15 of the July 18, 2001 Order to permit media representatives to request relaxation of the juror no-contact provision "subsequent to the entry of the verdict in this case." The Appellate Division denied PNI's motion for leave to appeal the trial court's disposition.

The trial began in mid-October and jury deliberations commenced November 2, 2001. On November 13, 2001 the trial court, having determined that the jurors were unable to reach a verdict, declared a mistrial and discharged the jury. PNI immediately moved to vacate or relax paragraph 15 of the July 18, 2001 Order to permit interviews of the discharged jurors. The trial court refused to modify either paragraph 13 or 15, and ruled that they "remain in full force and effect, and the news media are prohibited from conducting interviews of any discharged jurors on this case and from publishing the identity or descriptions that would reasonably identify any discharged juror." The court explained:

> [T]here might be different considerations were this a jury that was completely discharged and no further proceedings would be held. Clearly that is not the case. I believe that Fred Neulander received a fair trial in this courtroom and he certainly has the right to a fair trial again.... [I]f there were to be a relaxation of either of these two provisions it has the capacity to

> undermine or weaken his right to a fair trial and specifically I find that jurors who are summoned **[259]** for possible jury service, whether it be in this county or in another county, will know that they run the risk of having their names published and they run the risk of having their private deliberations in the jury room discussed, analyzed, broadcast, or in other ways disseminated and I think that those things do have the capacity to chill the free exchange of ideas in the jury room and will also have the capacity to restrict the jury pool that will be available for this case.

After PNI moved for leave to appeal the trial court's disposition, the court supplemented its oral opinion with a letter to the Appellate Division. The letter stated in part:

> At the time of the hearing, I was unaware that despite my Order to the contrary, news organizations had already followed jurors home, knocked on their doors and left letters in their mailboxes. Some jurors were contacted more than once by the same news organizations, either by repeated telephone calls or repeated visits to the jurors' homes. Some jurors reported that news vans or reporters in cars remained parked outside their homes or other locations waiting for them to emerge. One juror told me she requested stepped-up police patrols of her home. Other jurors have reported to me that news organization have repeatedly telephoned their employers. Such contacts have included repeated telephone calls to both the immediate supervisor and to the public information officer as well as the use of e-mail sent to the employers, all of which was in an attempt to contact the jurors.
>
> In addition, one television station broadcast footage of the jurors, including their faces, as they left the courthouse the day the mistrial was declared.... Finally, on November 16, 2001, the Philadelphia Inquirer, a party

> to this appeal, published the name of the forelady on the jury, in violation of another portion of my July 18, 2001 Order.
>
> The above information is derived from telephone calls I received from six different jurors objecting to the efforts of the news organizations to contact and interview them. Some jurors called me more than once.

In an unpublished opinion, the Appellate Division upheld the restrictions imposed by the trial court, noting that "[t]he record amply supports the judge's essential conclusion that interviews with discharged jurors and publication of their names would pose a clear and present danger to defendant's right to a fair trial." The court observed:

> Although appellant asks us to consider separately the prohibitions against identifying jurors and interviewing them, we view the two as interrelated. It is unlikely that media accounts would name discharged jurors without further comment. The likelihood is that the deliberations of the discharged jurors would be discussed and published. The sanctity of the discharged jury's deliberations is critical to the judiciary's capacity to select a fair and impartial jury on retrial. Jury deliberations are not public. The singular vice of disclosure of prior deliberations is its capacity for destroying the ability of the jury on retrial to deliberate on the issue of guilt or innocence free of extraneous influence. This potential for harm inheres in the subtly coercive effect the media's account of prior deliberations would undoubtedly have on the ability of the jury on retrial to be fair.

[260] We granted PNI's motion for leave to appeal.

II

A

The restriction on the publication of juror identifications implicates more clearly established First Amendment principles

than does the prohibition of juror interviews. The obvious distinction is that the juror identities were disclosed in open court proceedings attended by media representatives. In comparison, jury deliberations, presumably the primary subject of the media's request to interview jurors, are a closed proceeding attended by no one but the deliberating jurors.

A leading case addressing the media's right to publish information lawfully obtained in the course of public court proceedings is *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). The issue in *Cox* was whether the State of Georgia constitutionally could recognize a father's cause of action for damages for invasion of privacy resulting from publication of the name of his daughter, a deceased rape victim, that was publicly revealed in connection with the prosecution of the crime.

The rape and murder of the victim occurred in August 1971 and six young men were indicted for the crimes. The victim's name was not publicly disclosed prior to trial, probably because of a Georgia statute making it a misdemeanor to publish or broadcast the name or identity of a rape victim. At a court appearance in April 1972, five of the defendants pleaded guilty to rape or attempted rape. On that occasion a reporter for Cox learned the victim's name by examining the indictments that were made available for his inspection in the courtroom. The victim's name then was disclosed in a news report broadcast later that day over the facilities of a television station owned by Cox.

The victim's father sued for damages, claiming that his right of privacy had been invaded by the broadcast. The trial court, relying on the Georgia statute, granted the father's motion for summary judgment on liability and rejected Cox's contention that its publication of the victim's name was protected by the First and Fourteenth Amendments. The Georgia Supreme Court initially held that the cause of action had its roots in the common law and was not based on the statute. It agreed that

the constitutional arguments did not compel dismissal of the suit and remanded the matter for trial. On rehearing, that court expressly relied on the Georgia statute as a declaration of State policy that rape victims' identities are not of public concern, sustaining the constitutionality of the statute against a First Amendment challenge.

Reversing, the Supreme Court framed the issue as a "collision between claims of privacy and those of the free press," *id.* at 491, 95 S.Ct. at 1044, 43 L.Ed.2d at 347, and emphasized its prior recognition that accurate reports of open judicial proceedings enjoyed a special protected status:

> 'A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, **[261]** or censor events which transpire in proceedings before it.' *Id.* at 492-93, 95 S.Ct. at 1045, 43 L.Ed.2d at 348 (quoting *Craig v. Harney,* 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947)).

Observing that "the interests in privacy fade when the information involved already appears on the public record," the Court, 8-1, concluded that the freedom of the press afforded by the First and Fourteenth Amendments precluded Georgia from making publication of the victim's name a basis for civil liability:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby be-

> ing served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.
>
> We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. Id. at 495-96, 95 S.Ct. at 1046-47, 43 L.Ed. 2d at 349-50.

Similarly, in *Nebraska Press, supra,* 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683, decided one year after Cox the Court reiterated its recognition that media reports of events that transpire in public courtroom proceedings enjoy First Amendment protection. There, a Nebraska state trial court, in anticipation of a trial for a multiple murder and related sexual assaults that had attracted widespread media coverage, granted the prosecutor's motion for a restrictive order prohibiting anyone that attended

the court proceeding from " 'releas[ing] or authorizing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced.' " *Id.* at 542, 96 S.Ct. at 2795, 49 L.Ed. 2d at 688. That order was modified by the Nebraska District Court to apply only until the jury was impaneled and to specify more precisely the subjects about which publicity was to be restricted. The Nebraska Supreme Court further modified the order to prohibit reporting of only three subjects: "(a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts 'strongly implicative' of the accused." *Id.* at 545, 96 S.Ct. at 2796, 49 L.Ed.2d at 689.

Although the orders at issue expired when the jury was impaneled, the United States Supreme Court ruled that the case **[262]** was not moot because the underlying controversy was " 'capable of repetition.' " *Id.* at 547, 96 S.Ct. at 2797, 49 L.Ed.2d at 690. Reversing the judgment of the Nebraska Supreme Court, the Court noted the special protection afforded by the First Amendment against prior restraints on speech:

> "Congress shall make no law ... abridging the freedom ... of the press," and it is "no longer open to doubt that the liberty of the press and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." ... The Court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary orders that impose a "previous" or "prior" restraint on speech. None of our decided cases on prior restraint involved restrictive orders entered to protect a defendant's right to a fair and impartial jury, but the opinions on prior restraint have a common thread relevant to this case.

> The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.
>
> The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment.... For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct. *Id.* at 556-59, 96 S.Ct. at 2801-03, 49 L.Ed.2d at 695-98 (citations omitted).]

The Court also determined that the lower courts did not adequately consider or determine whether alternative measures less drastic than the restrictions imposed on the media would have protected defendant's right to a fair trial:

> We have noted earlier that pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." ... Appellate evaluations as to the impact of publicity take into account what other measures were used to mitigate the adverse effects of publicity. The more difficult prospective or predictive assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice.

> We have therefore examined this record to determine the probable efficacy of the measures short of prior restraint on the press and speech. There is no finding that alternative measures would not have protected Simants' rights, and the Nebraska Supreme Court did no more than imply that such measures might not be adequate. Moreover, the record is lacking in evidence to support such a finding.
>
> *Id.* at 565, 96 S.Ct. at 2805-06, 49 L.Ed.2d at 701 (citation omitted).]

Significantly, the Court noted that the Nebraska Supreme Court's modified order effectively prohibited the media, among **[263]** other things, from reporting evidence that had been introduced at a preliminary hearing open to the public and the press, a restriction that the Court concluded was constitutionally infirm:

> To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: "(T)here is nothing that proscribes the press from reporting events that transpire in the courtroom." *Sheppard v. Maxwell,* 384 U.S. at 362-363, 86 S.Ct. at 1522. *See also Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); *Craig v. Harney,* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947). The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law; but once a public hearing had been held, what transpired there could not be subject to prior restraint. *Id.* at 568, 96 S.Ct. at 2807, 49 L.Ed.2d at 703.

Primarily because the lower courts had failed to consider the adequacy of less restrictive alternatives, the Court reversed the judgment below. *Id.* at 570, 96 S.Ct. at 2808, 49 L.Ed.2d at 704.

Similarly, in *Oklahoma Publishing Co. v. District Court,* 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977) at issue was the validity of a pretrial order entered in a Juvenile Court proceeding that enjoined members of the news media from "publishing, broadcasting, or disseminating in any manner, the name or picture of a minor child" in connection with a juvenile proceeding concerning that child then pending before the court. Before the contested order was entered, the court had conducted a detention hearing at which the juvenile appeared, and newspaper reporters, including one from petitioner's newspapers, had been in attendance and learned the juvenile's name. One of petitioner's photographers had photographed the juvenile during his removal from the courtroom. Subsequently, a number of news stories appeared in local papers, including three newspapers owned by petitioner that included the juvenile's name and photograph. Petitioner challenged the pretrial order restraining publication as violative of the First and Fourteenth Amendments. The Oklahoma Supreme Court upheld the order, relying on a state statute mandating that juvenile proceedings are to be private unless otherwise ordered by the court and that juvenile records are open to inspection " 'only by order of the court to persons having a legitimate interest therein.' " *Id.* at 309-10, 97 S.Ct. at 1046, 51 L.Ed.2d at 357 (quoting Okla. Stat. Ann. Tit. 10, §§ 1111, 1125 (West Supp. 1976)).

Relying on *Cox* and *Nebraska Press,* the Supreme Court reversed, observing that the order prohibiting publication was invalid because the juvenile's name and photograph lawfully had been obtained in the course of open court proceedings:

> We think *Cox* and *Nebraska Press* are controlling nonetheless. Whether or not the trial judge expressly made such an order, members of the press were in fact present at the hearing with the full knowledge of the presiding judge, the prosecutor, and the defense counsel. No objection was made to the presence of the press in the courtroom or to the photographing of the juvenile as he left the courthouse. There is no evi-

> dence that petitioner acquired the information unlawfully or even without the State's implicit approval. The name and picture of the juvenile here were 'publicly revealed in connection with the prosecution of the crime,' much as the name of the rape victim in *Cox Broadcasting* was placed in the public domain. Under **[264]** these circumstances, the District Court's order abridges the freedom of the press in violation of the First and Fourteenth Amendments.
>
> [430 U.S. at 311-12, 97 S.Ct. at 1047, 51 L.Ed.2d at 358-59 (citation omitted) (footnote omitted).]

The Supreme Court also has accorded constitutional protection to factually accurate information published or reported by the media and lawfully obtained, although not from open court proceedings. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 533-35, 121 S.Ct. 1753, 1764-65, 149 L.Ed.2d 787, 805-06 (2001) (holding that application of wiretap acts' prohibitions against intentional disclosure of illegally intercepted communication, that disclosing party knows or should know was illegally obtained, to media defendants who were uninvolved in illegal interception violated defendants' free speech right because tape concerned matters of significant public importance); *The Florida Star v. B.J.F.*, 491 U.S. 524, 526, 109 S.Ct. 2603, 2605, 105 L.Ed.2d 443, 450-51 (1989) (holding that First Amendment precludes Florida from permitting rape victim, whose name inadvertently was disclosed by newspaper that lawfully obtained victim's name from County Sheriffs Department, from recovering damages against newspaper notwithstanding Florida statute making it unlawful to " 'print, publish, or broadcast ... in any instrument of mass communication' " name of victim of sexual offense)(quoting Fla. Stat. Ann § 794.03 (1987); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-06, 99 S.Ct. 2667, 2671-72, 61 L.Ed.2d 399, 405-08 (1979) (holding that West Virginia statute that prohibited newspapers from publishing, without consent of juvenile court, name of any youth charged as juvenile offender violated First and Fourteenth Amendments as ap-

plied to newspapers that truthfully published alleged delinquent's name that was lawfully obtained by monitoring police band radio frequency and interviewing eyewitnesses).

B

The question whether a court, to protect a defendant's Sixth Amendment rights on retrial, can prohibit interviews of members of a hung jury that could not reach a verdict in the guilt phase of a capital murder prosecution appears to be an issue of first impression. Research discloses that the narrow issue before us was adverted to in dicta by the Second Circuit Court of Appeals in *United States v. Moten*, 582 F.2d 654 (1978), where the court reversed the District Court's denial of a convicted defendant's request to conduct post-verdict interviews of jurors in a case in which a juror had been discharged for apparent misconduct. In commenting on the authority of the trial court to bar all juror interviews the Second Circuit observed:

> When there has been a showing warranting an investigation, barring all interviewing, even under supervision of the court, is improper. We note that even in *Miller* further inquiry was not foreclosed. *In some cases, a complete bar may be appropriate. An example given in Professor Moore's Treatise is "a publicized case which ends in a hung jury and is likely to be retried."* In such a case, "the trial judge should instruct jurors not to disclose the deliberation, lest it jeopardize the fairness of the second trial." 8A Moore's Federal Practice--Criminal Rules ¶ 31.08[1][b], at 31-58 n. 13 (2d ed.1977). *Id.* at 666 (citation omitted) (emphasis added).]

The reported decisions in federal and state courts concerning the right of media representatives to conduct post-verdict juror interviews do not include criminal **[265]** cases in which, as in the matter before us, a hung jury will require an imminent retrial. The general rule that we distill from the cases is that post-verdict juror interviews generally are permitted if the juror

consents, but jurors are not required to consent. Moreover, courts often require that media representatives refrain from making repeated requests for interviews, and that jurors not be questioned about the votes or opinions of other jurors.

Among the more restrictive recent opinions is *United States v. Brown*, 250 F.3d 907 (5th Cir. 2001), involving an appeal by news media from orders of the District Court in the second criminal trial of former Louisiana Governor Edwin Edwards. Because of allegations of attempted bribery and witness tampering the court granted the Government's motion for an anonymous jury, and also prohibited the media from attempting to "circumvent" the jurors' anonymity. The court also barred the media from portions of the jury *voir dire*. After the verdict acquitting Governor Edwards of all charges, the court informed the jurors that it would not disclose their identities without their consent. Jurors consenting to disclosure of their identifies were instructed that they could refuse to permit any interviews, that they could discuss with the media their general reactions to the trial, but that they could not be interviewed about jury deliberations without a court order. No jurors waived the right to anonymity. Shortly after the verdict the court unsealed the transcript of the closed *voir dire*.

On appeal, the Fifth Circuit held that the District Court's order barring the media from "circumventing" its juror anonymity order was an unconstitutional prior restraint to the extent that it "interdicted the press from independent investigation and reporting about the jury based on facts obtained from sources other than confidential court records, court personnel or trial participants." *Id.* at 917-18. The court, however, upheld the trial courts post-verdict refusal to disclose juror names and addresses without their consent, noting that the court did not prohibit media interviews with consenting jurors, and also observing that in the unique circumstances of the underlying trial the rationale for protecting the jurors' identities continued to be relevant after the verdict. The court stated:

> The district court's order denying the request for juror identifying information and questionnaires in this case is analogous to the order upheld in *Cleveland*. The order is sufficiently narrow. It has no requirement for a showing of good cause for conducting post-verdict interviews. It merely states that the court will not release juror information without the juror's consent. The judge affirmatively asked the jurors whether they wished to relinquish their privacy. Any juror may, at any time, voluntarily decide to relinquish his confidentiality. The only restriction placed on such interviews is the court's instruction that jurors may not be interviewed concerning juror deliberations absent a special order from the judge. This is consistent with our understanding that "[c]ompelling governmental interest[s] in the integrity of jury deliberation require that the privacy of such deliberations and communications dealing with time be preserved."
>
> According to this circuit's established case law, protecting jurors from post-verdict harassment and invasions of privacy is a legitimate concern. The measures used by the district court, while at the outer limit of permissible restrictions, were narrowly tailored to prevent real threats to the administration of justice, not just in this case but in the subsequent related prosecutions. If jurors **[266]** voluntarily waive their anonymity and consent to interviews on matters other than jury deliberations, so be it. They need not become unwilling pawns in the frenzied media battle over these cases. [*Id.* at 921 (citations omitted) (footnote omitted).]

Similarly, in *United States v. Cleveland*, 128 F.3d 267 (1997), the Fifth Circuit upheld the validity of a trial court order, following a highly publicized criminal trial of six defendants, including two former Louisiana state senators, on racketeering charges, that prohibited post-verdict media interviews of

jurors *concerning jury deliberations* without court approval. Two newspaper publishers and two reporters challenged the order, contending that it compromised their First Amendment right to gather news because the restrictions on interviews about juror deliberations was impermissibly vague. Upholding the trial court's order, the Fifth Circuit concluded that the restriction on interviews concerning deliberations was sufficiently clear and did not restrict the media from questioning jurors about their general reactions to the trial. The court observed:

> The order entered by Judge Vance does not foreclose "questions about a juror's general reactions," as did the order in *Express-News*. The newspapers have argued that the use of the term "deliberations" is imprecise and might be construed by jurors wishing to speak as extending to their individual reactions to the trial proceedings occurring in open court. We disagree. The restriction of post-verdict interviews concerning "jury deliberation" was expressly endorsed by this Court in *Harrelson*. As contemplated by *Harrelson* and as used in Judge Vance's order, "deliberations" refers only to the discussions about the case occurring among jurors within the sanctity of the jury room. A juror in this case may be interviewed about his own "general reactions" to the trial proceedings, and he is only prevented from being interviewed about the private debates and discussions which took place in the jury room during the time leading up to the jury's rendering of its verdict.
>
> ...
>
> The term "deliberations of the jury" may not be a paragon of definiteness and precise meaning. Few terms in our language are. The term does, however, bring an immediate image to mind: the members of a jury in the jury room discussing and debating the evidence, the testimony, and the instructions from the

> court in order to reach a verdict. We hold that the term "jury deliberations" is sufficiently definite to convey the idea the district court intended and does not realistically threaten First Amendment protected communication. That is all that the law requires.
>
> [*Id.* at 270-71 (citations omitted).]

In *United States v. Antar*, 38 *F.*3d 1348 (3d Cir. 1994), at issue were orders of the trial court in a highly publicized criminal fraud trial sealing for five months the transcript of the jury *voir dire* from which members of the press had been excluded because the courtroom was overcrowded, and imposing restrictions on post-verdict juror interviews by the media. Media representatives challenged the validity of the sealing order and of the interview restrictions that essentially stated: (a) no juror may be compelled to grant an interview; (b) repeated requests that a juror grant an interview are prohibited; (c) if a juror expresses a desire to terminate an interview in progress, the interviewer must terminate questioning immediately; (d) during the interview of a juror, no question may be asked about the votes, statements, opinions or comments of any **[267]** other juror during jury deliberations. Although the District Court unsealed the *voir dire* transcripts approximately five months after the verdict, the Third Circuit held that the trial court's order sealing the *voir dire* transcripts for five months violated the media's First Amendment right of access to voir dire proceedings. The court noted:

> Pursuant to *Press-Enterprise I*, then, there exists a presumptive right of access to voir dire proceedings. This right of access may not be abridged absent the satisfaction of substantive and procedural protections. On the substantive side, a court ordering closure must first establish that the competing interest asserted is not only "compelling," but also that it outweighs the First Amendment right of access. Second, it must determine that the limitations imposed are both neces-

> sary to and effective in protecting that interest. One part of establishing the necessity of a limitation is a consideration of alternative measures and a showing that the limitation adopted is the least restrictive means of accomplishing the goal. On the procedural side, these determinations must be covered by specific, individualized findings articulated on the record *before* closure is effected.
>
> *Id.* at 1358 (citation omitted).]

Because the trial court made no findings to justify the order sealing the *voir dire* transcripts, and failed to consider whether less restrictive alternatives would have been adequate, the Third Circuit invalidated the order sealing the transcripts. The court also invalidated two of the court-imposed restrictions on post-verdict juror interviews because of the absence of any finding that those restrictions were necessary. The court stated:

> As noted above, there is substantial debate about the value of post-verdict interviews. *Supra* note 8. The benefits of access and of public awareness of the duties and obligations of the jury process are weighed against concerns that courts may become carnivals, that jurors may be reluctant to serve in future cases if they fear their comments in the jury room will be repeated later by their fellow jurors for broadcast to the public, and that public knowledge of the factors behind a verdict may undermine respect for the process.
>
> Turning to the specific restrictions imposed here, we will affirm the first, that no juror is obliged, or may be compelled, to grant an interview. This restriction is consistent with the advice long given to jurors concerning post-trial press contacts. We conclude, however, that the second and third prohibitions, against "repeated" juror contacts and against any attempt to resume a juror interview after a juror expresses a desire to conclude it, cannot stand in the absence of any

> finding by the court that harassing or intrusive interviews are occurring or are intended. The existing or threatened basis for such restrictions must be present before they are imposed. Furthermore, even if sufficient basis for imposing these restrictions did exist, it is not certain that, in the absence of the consideration of alternatives, they would have been the least restrictive means available to the court. *Id.* at 1363-64.

The Third Circuit also upheld the restriction on questions about the opinions of other deliberating jurors, although expressing concern about the lack of justification for that restriction. *Id.* at 1364.

Similar restrictions on post-verdict juror interviews were upheld in *United States v. Doherty*, 675 F.Supp. 719 (D. Mass. 1987). That case involved a seventeen-week criminal racketeering trial during which the **[268]** jury was sequestered and juror names and addresses were not disclosed during the trial. After the verdict the jurors unanimously expressed their preference not to disclose their names and addresses to the press. Two newspapers intervened to compel identification of the jurors.

The District Court determined, based on First Amendment considerations, that post-verdict identification of jurors was required, but delayed disclosure of juror names and addresses for seven days to afford "to each juror a short breathing space to reflect on the experience of jury service and, after consultation with family and friends, determine what, if anything, the juror wishes to discuss with the press." *Id.* at 725. The court also ordered that any juror had the right to refuse to grant an interview request, and prohibited any further inquiry of any juror expressing a desire not to be interviewed. *Id.* at 726.

The media's right to conduct post-verdict juror interviews also was recognized by the Tenth Circuit Court of Appeals in *Journal Publishing Company v. Honorable E. L. Mechem*, 801 F.2d 1233 (1986). Following a civil trial in which the plaintiff

prevailed on a claim that the police chief and other police officers of the City of Albuquerque had violated his civil rights, the trial court issued an order prohibiting jurors from discussing the case with media representatives. A local newspaper sought review of the order. The Tenth Circuit, although acknowledging the trial court's authority to impose reasonable restrictions on post-verdict juror interviews, concluded that the trial court's order was overbroad and impermissibly infringed on the media's First Amendment rights:

> Judge Mechem's order restricting press contact with former jurors was impermissibly overbroad. It contained no time or scope limitations and encompassed every possible juror interview situation. It would have been constitutionally permissible for the court routinely to instruct jurors that they may refuse interviews and seek the aid of the court if interviewers persist after they express a reluctance to speak. It could have told the jurors not to discuss the specific votes and opinions of noninterviewed jurors in order to encourage free deliberation in the jury room. But the court could not issue a sweeping restraint forbidding all contact between the press and former jurors without a compelling reason.

Id. at 1236-37 (citations omitted).]

Similarly, in *United States v. Harrelson,* 713 F.2d 1114 (1983), the Fifth Circuit upheld a trial court's order as imposing reasonable restrictions on post-verdict juror interviews following a criminal trial convicting several defendants of charges arising out of the murder of a Federal judge. The challenged restrictions stated:

> 1. No juror has any obligation to speak to any person about this case, and may refuse all interviews or comment.

2. No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.

3. No interviewer may inquire into the specific vote of any juror other than the juror being interviewed.

4. No interview may take place until each juror in this case has received a copy of this order, mailed simultaneously with the entry of this order. *Id.* at 1116.

The Court of Appeals upheld the ban on repeated requests for interviews as one designed merely to "forbid nagging." *Id.* at 1118. In sustaining the restriction against inquiries about the votes of other jurors, the Court observed:

> We must now determine the validity of the above "rule narrowly tailored to **[269]** prevent the disclosure of the ballots of individual jurors," a matter on which we expressly declined comment in *Express-News*, 695 F.2d. at 811. Our ruling requires little more than a specific application of the general principles announced in *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977).
>
> There we held generally that members of the press, in common with all others, are free to report whatever takes place in open court but enjoy no special, First Amendment right of access to matters not available to the public at large. The particulars of jury deliberation fall in the latter class, and the court's narrow restriction was well within its discretion. As the Supreme Court observed, in the course of assuming the existence of a common-law privilege against forced disclosure of such matters: Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world (quoting *Clark v. United States*, 289 U.S. 1, 13, 53 S.Ct. 465, 468, 77 L.Ed. 993 (1933) (Cardozo, J.)). *Id.* at 1118.

See also In re Globe Newspaper Co., 920 F.2d 88, 91, 98 (1st Cir. 1990) (invalidating trial court's refusal following high profile criminal trial to provide newspaper publisher with juror names and addresses, and noting that although Court "shares [the] view that it is unfortunate when a juror divulges the jury's deliberations" and that "[n]othing compels or encourages a juror to be interviewed," jurors identity cannot be withheld post verdict absent special circumstances justifying nondisclosure); *In re Express-News Corporation,* 695 F.2d 807 (5th Cir. 1982). (invalidating as overbroad District Court rule prohibiting post-verdict interviews of any juror concerning jury deliberations or verdict in any proceeding without leave of court); *United States v. Sherman,* 581 F.2d 1358, 1361-62 (9th Cir. 1978) (reversing trial court order following guilty verdict in high profile criminal trial prohibiting jurors from discussing case and barring news media from contacting jurors, but holding that although interviews were permissible jurors had no obligation to respond to interviews and should report to court persistent attempts to interrogate them); *United States v. Franklin*, 546 F.Supp. 1133, 1144 (N.D. Ind. 1982) (ordering that post-verdict juror interviews following high profile civil rights trial are permitted only if jurors consent and noting that court "can discourage jurors from communicating about the contents of juror deliberations without ordering them to refrain from doing so"); *In re Disclosure of Juror Names and Addresses,* Mich. App. 604, 592 N.W.2d 798, 809 (Mich.Ct.App. 1999) (holding that in high profile serial rape and murder trial press has qualified right of post-verdict access to jurors names and addresses subject to trial court's right to fashion order that considers such interests as juror safety).

Scholarly commentary on the subject of post-verdict juror interviews is sparse. One recent article surveyed post-verdict interviews of jurors that were reported by news media during the preceding fifteen years. Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors,* 82 Iowa L.Rev. 465 (1997). (Deliberations and Disclosures).

The author notes that the most frequently expressed comments by jurors that participated in post-verdict interviews focused on the evidence that influenced the jury's verdict.

> Among the instances in which jurors offered some explanation or observation **[270]** about the decision the jury reached or the dynamics that characterized its deliberations, *the largest percentage (32%) of comments pertained to the evidentiary basis for the jury's decision*. Typically, jurors pointed to the evidence that they had found persuasive: white-out on a bill in the tax case against Leona Helmsley; the credibility of the victim in the rape charges brought against Mike Tyson; the credibility of witnesses in the Bensonhurst case, in which Joseph Fama was convicted of the murder of Yusuf Hawkins; the implausible testimony of Jean Harris, who was convicted of murdering her lover; the lack of credibility of John Bobbitt in the unlawful wounding charge brought against his wife Lorena Bobbitt; the unreliability of the testimony of the prosecution's star witness in the conspiracy and assault charges brought against John Gotti and in the murder charges brought in Howard Beach; the sheer accumulation of evidence in the World Trade Center bombing; inconsistencies in the State's evidence in the rape trial of William Kennedy Smith; and evidence, rather than emotion, in the trial of O.J. Simpson. [*Id.* at 479-80 (emphasis added).]

Professor Marder also observes that post-verdict interviews can undermine the indivisibility of the jury's function:

> Post-verdict interviews of jurors undercut the unitary aspect of the jury. This aspect is important given the power that is accorded a jury verdict and its significance as a judgment of the community. On a practical level, it is the jury verdict, and not the views of individual jurors, that has power; on a symbolic level, it is

> the jury verdict, and not the views of individual jurors, that represents the judgment of the community. The jury acquires its power and meaning as a group, and post-verdict interviews threaten that group aspect. Such interviews treat the jury as if it is nothing more than a gathering of individuals involved in the exchange of ideas. Although this is certainly part of what the jury does, it does much more; the jury is not simply the sum of its parts. Post-verdict interviews, by focusing on individuals' comments or points of view, overlook the group nature of the jury's task. [*Id.* at 473.]

She recommends that courts should provide guidance to jurors concerning post-verdict interviews that emphasizes the importance of confidentiality and that prohibits the disclosure of the votes or comments of the other jurors. *Id.* at 546.

Another commentator advocates the imposition of significant restrictions on post verdict juror interviews, conditioning their occurrence on specific authorization by the trial court. Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews,* 1993 U. Ill. L.Rev. 295, 312. Professor Goldstein expresses the view that post-verdict interviews impose on juries a level of accountability that conflicts with their role as the community's conscience:

> The media seek interviews in the most sensational cases, in which public attention is highest. Jurors called to serve in such cases will expect to be interviewed and will expect their fellow jurors to be interviewed. Inevitably, that expectation will affect how freely they talk to each other; it will make them feel visible to the world and accountable as individuals, not as a body. The previously anonymous jurors, reaching a group decision based on "community values" and lay perspectives, will feel they must justify it in the court of public opinion.

> **[271]**....Unchecked, the interviewing of jurors in high visibility cases will expose to view "the difficult and uniquely human judgments that defy codification and that 'build discretion, equity and flexibility into a legal system.' " That, in turn, surely will unravel the distinctive nonrational and intuitive "genius" of this lay tribunal. [*Id.* at 314.]

See also Robert Lloyd Raskopf, A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process, 17 Pepp. L.Rev. 357, 378 (1990) (advocating qualified post-verdict media right of access to jurors names and addresses to be balanced in each case against interests disfavoring such access).

III.

A.

As noted, paragraph 13 of the trial court's July 18, 2001 Order provides: "Neither the identity nor descriptions that would reasonably identify any juror may be publicized, in any way, unless authorized by further Order of this Court." In our April 22, 2002 Order disposition we unanimously determined to vacate paragraph 13 "to the extent that it restrains the use of juror identification information that is part of the public record of these proceedings."

Plaintiffs brief indicates that on August 21, 2002, "the first four prospective jurors were individually examined in an open *voir dire* proceeding attended by members of the media" and that "[e]ach juror was identified by name when placed under oath and referred to by name when examined by counsel." Although the record is silent, we infer that the *voir dire* of the remaining jurors similarly was conducted in open court proceedings. We also take note of statutory provisions that contemplate public posting in the County Clerk's office of the names selected from the juror source list to be summoned for services as petit jurors. *See N.J.S.A.* 2B:20-4 and - 5.

Unlike other cases in which juror identities were anonymous during trial in order to insulate jurors from corrupting influences or to protect them from harassment and intimidation, see *U.S. v. Brown, supra*, 250 F.3d at 910-11, the names of the jurors at issue here publicly were identified throughout the *voir dire* proceeding. The record does not reflect that either the parties or the trial court expressed concern about the public identification of jurors that freely occurred during the jury selection process. In that context, we reaffirm our prior holding vacating paragraph 13 of the July 18, 2001 Order "to the extent that it restrains the use of juror identification information that is part of the public record of these proceedings." We reiterate the Supreme Court's cogent rationale for protecting the freedom of the media to report truthful information derived from open court proceedings:

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.
>
> **[272]** [*Cox Broadcasting Corp., supra*, 420 U.S. at 495, 95 S.Ct. at 1046, 43 L.Ed.2d at 350.]

B

In explaining the rationale underlying both the restriction on juror identification and the restriction on post-verdict interviews the trial court expressed concern about defendant's right to a fair retrial, focusing on the possible adverse effects on the

retrial jury. Specifically, the court expressed concern that the retrial jurors' knowledge that members of the original jury were interviewed by the media would "have the capacity to chill the free exchange of ideas in the jury room and will also have the capacity to restrict the jury pool that will be available for this case."

We decline to rest our continuing restriction of post-verdict interviews of members of the hung jury on those specific concerns. In our view, the inhibiting effect of media interviews of the first jury on "the free exchange of ideas"by members of the retrial jury simply is too speculative a basis on which to justify restricting the media's right of access to consenting jurors. We also are inclined to doubt that such juror interviews would "restrict the jury pool" on retrial. We noted in *State v. Biegenwald*, 106 N.J. 13, 35-36, 524 *A*.2d 130 (1987), "that persuasive pretrial publicity does not necessarily preclude the likelihood of an impartial jury," and that "the appropriate inquiry is whether the jury selection process actually resulted in a fair and impartial jury." In this matter, both the passage of time and the trial court's determination to change the venue for retrial suggest that the task of empaneling an impartial jury will not be insurmountable.

Our apprehension about the propriety of media interviews of members of the hung jury derives from this Court's extensive and unique experience since the 1982 reinstatement of the death penalty in reviewing in excess of fifty direct appeals from murder convictions in which the death penalty has been imposed, in addition to several appeals from denial of post-conviction relief in capital cases as well as numerous proportionality review proceedings. That experience, coupled with the recognition "that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice," *Gregg v. Georgia,* 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859, 883 (1976), counsels that the Court be extremely cautious concerning juror interviews when a death penalty retrial is pending.

Our most specific concern is that jurors submitting to media interviews might reveal some insight into the jury's deliberative process that would afford the prosecution a significant advantage at the retrial and thereby provide defendant with a colorable Sixth Amendment issue for appeal in the event of a conviction. We previously have noted the survey statistics revealing that when jurors consent to media interviews "the largest percentage (32%) of comments pertained to the evidentiary basis for the jury's decision." *Deliberations and Disclosures, supra,* 82 Iowa L. Rev. at 479. We reasonably can infer that if post-verdict interviews of members of the hung jury had been permitted, reports of those interviews would have been likely to reveal the reactions of individual jurors to the evidence presented, and might also have included observations by jurors about specific strengths and weaknesses in the State's case. Whether such reports significantly would have affected the retrial strategies of the prosecution and defense is unknown. In our view, however, the risk that such disclosures could provide the prosecution with an undue **[273]** advantage in the retrial proceeding is sufficiently substantial to persuade us that the safer course is to disallow the interviews despite the attendant limitation on the media's First Amendment interests.

We previously have acknowledged that the first trial was televised and was the subject of widespread publicity. PNI asserts that the prohibition on interviews is unlikely to be effective because the news media can publish information about juror deliberations obtained from a third party who spoke with a juror. Nevertheless, we perceive that the potential for affording the prosecution an inappropriate advantage in a retrial could be increased if media interviews of members of the hung jury revealed heretofore undisclosed details about evidentiary facts that were pivotal to the jury's deliberations.

Although we find little precedent on the precise issue, we note that concerns analogous to those that support our holding were implicated in the Appellate Division's decision to bar the penalty phase of a death penalty trial in *State v. Baker*, 310

N.J.Super. 128, 708 A.2d 429 (1998). In that capital case, the defendant was found guilty by a jury of murder, felony murder, and other crimes. Although no physical evidence linked the defendant to the crime, the State's case relied on the testimony of two alleged accomplices, Scott Barnes and Eric Lewis, who entered into plea agreements and testified that defendant had inflicted the fatal wounds. After a six-week trial, the jury returned its guilty verdict on July 8, 1997, but was not discharged because of the pending penalty phase.

On July 10, 1997, a local newspaper reported the substance of the jury's guilt-phase deliberations in an article that began as follows:

> It was all there in black and white after a jury convicted Scott Baker of murdering Beatrice Baskin.
>
> The jurors made a list, with two columns on it. They left it in the jury room.
>
> They wrote down many reasons for convicting Baker, 25, of stabbing the 75-year-old Brick Township woman to death while robbing her. High on the list was testimony of Scott Barnes, 25, formerly of Manchester Township, who said he drove Baker to Baskin's house so he could rob her the night she was killed.
>
> And they wrote down two reasons for acquitting him: Eric Lewis, the ineffective state's witness, and the lack of physical evidence linking Baker to the killing. 310 N.J. Super. at 131, 708 A.2d 429.

The trial court conducted an inquiry to ascertain how the newspaper had obtained access to jury material described as "'records prepared by the jury, lists setting forth the manner in which its deliberations had proceeded and the manner in which they arrived at the conclusion that they arrived at.' " *Ibid.* The court determined that while the court clerk was in the jury room after the verdict to collect the exhibits for counsel, the County Prosecutor observed the jury material in question and disclosed

the contents to a reporter. Subsequently, the trial court granted defendant's motion to preclude the death penalty on grounds of double jeopardy and fundamental fairness, concluding that defendant would be prejudiced by proceeding to a penalty phase with a new jury. The trial court stated:

> This is a death penalty case and calls for enhanced scrutiny and vigilance considering that the State, as representative of the people, is seeking not to imprison the defendant, but to humanely extinguish **[274]** his life. The admonition of Justice Story, in the early double jeopardy decision of the U.S. Supreme Court, *United States v. Perez*, [9 Wheat. 579], 22 U.S. 579 [6 L.Ed. 165] (1824) at page 580, bears due consideration: "in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner." *Id.* at 134, 708 A.2d 429.

The Appellate Division affirmed, concluding that the Prosecutor's breach of the confidentiality of the jury's guilt phase deliberations mandated dismissal of the penalty phase proceeding:

> We are in full accord with Judge Turnbach's conclusion, for the reasons stated by him, that defendant, in these circumstances, will be substantially and irremediably prejudiced by proceeding on the penalty phase with a new jury. We are in full accord with the judge's conclusion that irrespective of any evil intent, the Prosecutor's conduct that placed defendant in his present predicament constituted an egregious, intentional and intolerable breach of the inviolability of the secrecy of jury deliberations. And we are in full accord with the judge's conclusion that the doctrine of fundamental fairness demands the remedy of preclusion. There is no effective alternative measure or lesser sanction available here. We appreciate that there is a

> countervailing interest of the public that criminal prosecutions not be thwarted and that wrongdoers be brought to account. We are satisfied, however, that that interest has been fully satisfied here by the unaffected return of the first- degree murder verdicts. *Id.* at 139, 708 A.2d 429.

Although the analogy between *Baker* and the issue before us is imperfect, the connecting thread is that jury deliberations are conducted in secrecy to preserve the integrity of the jury process. *State v. LaFera*, 42 N.J. 97, 106-07, 199 A.2d 630 (1964). Our court rules prohibit attorneys and parties from interviewing or questioning jurors about "any matter relating to the case" except by court order for good cause shown. *Rule 1:16-1*. Although we acknowledge that in ordinary circumstances the confidentiality of jury deliberations does not override the media's First Amendment interest in conducting post-verdict interviews of a consenting juror about that juror's reaction to the case, the media interest is not absolute. In special circumstances it may be required to yield to a compelling state interest, provided that any restrictions imposed are narrowly tailored to serve that interest. *See Globe Newspaper Company v. Superior Court*, 457 U.S. 596, 606-07, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248, 256-58 (1982).

The restriction on post-verdict interviews of the hung jury imposed by our April 22, 2002 Order expires on conclusion of the retrial and return of a verdict, and properly addresses the unique concern presented by this record that media interviews of jurors not encroach on defendant's Sixth Amendment right to a fair trial. The unwelcome limitation that we impose on the media in this matter does not diminish in the slightest the high value that this Court traditionally has accorded to the media's right to have access to and report on criminal proceedings, under both the federal and state constitutions. *State v. Williams*, 93 N.J. 39, 58-59, 459 A.2d 641 (1983). Nevertheless, our pragmatic understanding of and long experience in death penalty appellate litigation impel us to intervene in order to avoid

Sixth Amendment issues that inevitably would be raised if we stayed our hand.

[275] We note but reject our dissenting colleagues' concern, post at 226-27, 801 A.2d 277, that our expansion of the trial court's restraint to include juror-initiated interviews implicated PNI's due process interests. The grant of PNI's motion for leave to appeal was accompanied by the filing of supplemental briefs and extended oral argument. In the contest of the oral argument, the terms and conditions of this Court's April 22, 2002 Order were well within the range of possible disposition that the parties could have anticipated.

IV

For the reasons stated, we modify and affirm the July 18, 2001 order of the Law Division in accordance with this Court's Order of April 22, 2002.

LONG, J., concurring in part and dissenting in part.

I am in full agreement with the majority's conclusion that any restraint on the truthful dissemination of jurors' names, previously made public in pretrial proceedings, is unconstitutional. I also join in my colleagues' rejection of the lower courts' stated reasons for restraining post-verdict interviews of jurors initiated by the media. The passage of time, the already-ordered change of venue and a searching *voir dire will* ensure an adequate jury pool and the empanelling of impartial jurors capable of the free exchange of ideas. That is what the Sixth Amendment requires. U.S. Const. amend. VI.

I part company from the Court in connection with its extraordinary and unprecedented expansion of the prior restraint imposed by the lower courts on juror interviews. That order was entered without notice, without any basis in fact and without an effort at circumscription, thus constituting an intolerable infringement on First Amendment freedoms.

I

Restrictions on speech "may be lawfully imposed, if at all, only when narrowly tailored" to achieve a compelling state interest. *Florida Star v. B.J.F.*, 491 U.S. 524, 541, 109 S.Ct. 2603, 2613, 105 L.Ed.2d 445, 460 (1989). Like speech, newsgathering is entitled to First Amendment protection. *Branzburg v.Hayes*, 408 U.S. 665, 681, 92 S.Ct. 2646, 2656, 33 L.Ed.2d 626, 639 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510, 513 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but ... the right to receive ... and freedom of inquiry[.]") (citations omitted); *In re: Express-News Corp.*, 695 F.2d 807, 808-9 (5th Cir. 1982) ("[F]reedom to speak is of little value if there is nothing to say."). The question whether a prior restraint on those First Amendment rights is narrowly tailored to protect a compelling interest requires a "determin[ation] whether, as Learned Hand put it, 'the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' " *Nebraska Press Assn v. Stuart*, 427 U.S. 539, 562, 96 S.Ct. 2791, 2804, 49 L.Ed.2d 683, 699 (1976) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951)), *Express-News Corp., supra*, 695 F.2d at 810 ("A court rule cannot[ ] ... restrict the journalistic right to gather news unless it is *narrowly tailored* to prevent a substantial threat to the administration of justice.") (emphasis added). A court reviewing "one of the most extraordinary remedies known to our jurisprudence" must consider, among other factors, "how effectively a restraining order would operate to prevent the threatened danger" and whether other measures short of restraint **[276]** would mitigate the effects of unrestricted speech. *Nebraska Press Ass'n, supra*, 427 U.S. at 562, 96 S.Ct. at 2804, 49 L.Ed.2d at 699. In other words, the order must be *necessary* and it must be *effective* at achieving the government's goals.

In adjudicating whether a restraint on First Amendment freedoms meets those standards, all affected parties must be given proper notice and an opportunity to be heard, and the ordering court must cite to *specific evidence* explaining the necessity of its restrictions. *Id.* at 565, 96 S.Ct. at 2806, 49 L.Ed.2d at 701 (finding nothing in record, other than judicial speculation, supporting determination that no less restrictive alternatives would protect fair trial rights); *United States v. Antar*, 38 F.3d 1348, 1351 (3d Cir. 1994) ("In order to restrict the right of access, ... a court must carefully articulate specific and tangible, rather than vague and indeterminate, threats to the values which the court finds override the right of access."); *State ex rel. Beacon Journal Pub. Co. v. Kainrad*, 46 Ohio St. 2d 349, 348 N.E.2d 695, 697 (Ohio 1976) ("Before issuing any such order not to publish, it is obligatory upon the court to hold a hearing and make a finding that all other measures within the power of the court to insure a fair trial have been found unavailing and deficient.").

The fundamental First Amendment rights of free speech and the press demand the due process protections of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 148, 88 S.Ct. 1444, 1446-47, 20 L.Ed.2d 491, 495 (1968) (citing *Fiske v. Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108 (1927). In *Davis v. Scherer*, 468 U.S. 183, 201, 104 S.Ct. 3012, 3022-23, 82 L.Ed.2d 139, 154 (1984), the Supreme Court explained:

> While "(m)any controversies have raged about ... the Due Process Clause," ... it is fundamental that except in emergency situations *(and this is not one)* due process requires that when a State seeks to terminate (a protected) interest ..., it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before the termination becomes effective. Ibid.* (emphasis added) quoting *Board of Regents v. Roth*, 408 U.S. 564, 570 n. 7, 92 S.Ct. 2701, 2705 n. 7, 33 L.Ed.2d 548, 556 (1972) (quoting *Bell v. Burson*, 402

U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971)).

Those are the principles that should inform our analysis.

II

There are two separate orders at issue in this case. The first is the trial court order (affirmed by the Appellate Division) that restrained publication of jurors' names and prohibited post-verdict interviews of jurors initiated by the media. The second is this Court's order of April 22, 2002, reversing the interdiction against publication of jurors' names and expanding the restraints to include a prohibition on juror-initiated contact with the media.

Each order individually violates the procedural due process principles to which I have adverted. The trial court did not give notice, hold a hearing or take evidence before issuing its restrictive orders. In fact, early in the proceedings the court apparently promised jurors that their names would never be published. Even after the media challenged the court's orders, no evidence was adduced to support any factual findings that could justify the restrictions. Post-restriction argument is inadequate in these circumstances, in the absence of an emergency, because it has the improper effect of placing the burden on the opponent of the already-imposed restriction to show why it should be lifted when it is the proponent who should have borne the laboring oar from the beginning.

[277] Moreover, this Court's order has generated a due process problem of its own. Throughout these proceedings and even during oral argument before this Court, all parties expressed an understanding that the sole post-verdict interview issue was whether the restraint on *media-initiated* contact with jurors was justified. It was conceded by all parties, at all stages, that the trial court's order did not prohibit juror-initiated expressions or interviews. Yet that is exactly what the majority interdicted in the expanded order it entered on April 22, 2002. In other words, without argument and without notice that it in-

tended to expand the trial court's restraints, the Court acted to impair the jurors' free speech rights and consequently to limit the media's access to that information.

It goes without saying that *if--at the request of a litigant*--a court could not constitutionally grant relief that would "terminate, impair or modify a substantial right or claim of another" without providing that party with notice and an opportunity to be heard, *England v. Doyle*, 281 F.2d 304, 306 (9th Cir. 1960) (citing *Chaloner v. Sherman*, 242 U.S. 455, 37 S.Ct. 136, 61 L.Ed. 427 (1917), that neither could it do so *sua sponte*. In short, the extraordinary expansion of the trial court order to prohibit juror-initiated publicity, without notice or an opportunity to be heard on that specific issue, separate and apart from its substantive deficiency (see *infra* Point III), violated the procedural due process guarantees of the United States Constitution as well as our own. U.S. Const. amends. V, XIV; N.J. Const. art. 1, para. 1.

III

A

Obviously, if there is no true danger to any compelling interest, there is no need for a preventative measure. In such circumstances any limitation on a First Amendment right would fail. The majority has proposed as a compelling interest that media publication of the discharged jurors' perceptions about the trial will afford the prosecution an "undue advantage" in preparation for retrial, thus setting the stage for defendant to advance a "colorable" Sixth Amendment claim on appeal. *Ante* at 219, 801 A.2d 271-72.

That notion is nothing more than judicial speculation that is not only unsupported by the record but controverted by it. Intense media attention surrounded every aspect of this case. Gavel-to-gavel television coverage of the trial occurred along with legal and political disquisition on every word that the jurors heard out of the mouths of the witnesses, the attorneys and the court. Third-party commentary about the weaknesses and

strengths of the parties' cases could be seen and heard daily on almost any area network newscast and even through postings on Internet websites. Courier-Post Online, *Fred Neulander on Trial, at* http://www.southjerseynews.com/neulander; Courtroom Television Network LLC, *The Rabbi and the Hitmen, at* http://www.courttv.com/trials/neulander/index.html. Newspaper coverage was at a saturation point.

Simply stated, no aspect of this case has escaped public discourse. Thus, it is extremely unlikely that any comments made by former jurors would give even a crumb of new insight to a moderately competent prosecutorial team. In fact, it is so improbable that neither defense counsel nor the lower courts even alluded to it obliquely as support for a prior restraint. In sum, the record not only is devoid of anything to support the concerns on which the majority today rests its unprecedented decision; it, in fact, belies that decision.

[278] B.

Even assuming, however, that media interviews with jurors could be viewed as somehow problematic from a trial strategy point of view, that would not, in any event, be an invitation to a broad and unrestricted prior restraint on speech and the press. For any restraint to pass muster it would nevertheless have to satisfy the twin standards of necessity and effectiveness. *Nebraska Press Assn, supra,* 427 U.S. at 562, 96 S.Ct. at 2804, 49 L.Ed.2d at 699. In other words, it would have to be limned narrowly to impose the least restriction necessary to ameliorate the perceived evil. Implicit in such tailoring are the notions of underinclusivity and overbreadth, both of which are offended by the majority's order here.

Underinclusivity inheres in orders restraining the media:

> When a State attempts the extraordinary measure of punishing truthful publication, it must demonstrate its commitment to advancing [the competing] interest by applying its prohibition evenhandedly, to the small-time disseminator as well as the media giant. Where

> important First Amendment interests are at stake, the *mass scope of disclosure is not a surrogate for injury. A ban on disclosures effected by "instrument[s] of mass communications" simply cannot be defended on the ground that partial prohibitions may effect partial relief.* [*Florida Star, supra,* 491 U.S. at 540, 109 S.Ct. at 2613, 105 L.Ed.2d at 460 (emphasis added) (citations omitted).]

The order as modified and affirmed is underinclusive because it does not prevent jurors from discussing with friends, co-workers, relatives or even total strangers their reactions to the trial, and it certainly does not bar those third parties from relaying such information to the media. Neither does it prevent jurors from posting their thoughts on an Internet newsgroup or website or writing an essay or book about their experiences. *See Nancy S. Marder, Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 Iowa L.Rev. 465, 474 n. 21 (1997) (noting that in past thirty years, jurors have written over twelve books about their jury service). Indeed, if one of the jurors is a member of the media and chooses to write an editorial about his or her own jury service, such activity is beyond the scope of the order. In effect, the order is a partial prohibition directed solely at the media that provides ineffective relief and thus suffers from underinclusivity.

At the other end of the spectrum is the problem of overbreadth, which occurs when the government restricts more speech than is necessary to achieve a permissible result. The danger created by overbroad restraints is that "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by [an order] susceptible of application to protected expression," *Gooding v. Wilson*, 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408, 413 (1972), i.e., where the "continued existence of the [order] in unnarrowed form would tend to suppress constitutionally protected rights." *Coates v. City of Cincinnati*, 402 U.S. 611, 620, 91 S.Ct. 1686, 1691, 29 L.Ed.2d 214, 221 (1971)

(White, J., dissenting) (citation omitted); *Cantwell v. Connecticut*, 310 U.S. 296, 304, 60 S.Ct. 900, 903, 84 L. Ed. 1213, 1218 (1940) ("In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."). In sum, a restraint on speech

> must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. **[279]** "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Gooding, supra*, 405 U.S. at 522, 92 S.Ct. at 1106, 31 L.Ed.2d at 414 (quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405, 418 (1963).

The total ban on all contact between jurors and the media on all subjects renders the Court's order overbroad, prohibiting even those communications that could not possibly be relevant to trial strategy. The order effectively precludes inquiry into jurors' perceptions about general, public matters such as the judicial system and jury selection process. It prevents the jurors from speaking about the impact of jury duty on their day-to-day personal and professional lives. It even sanctions investigative reporting about issues of public importance. For example, after the mistrial, four PNI reporters published an article revealing a serious issue over whether the foreperson was actually a New Jersey resident. Joseph A Gambardello et al., *Rabbi Juror: "We All Saw it a Totally Different Way," Philadelphia Inquirer*, Nov. 16, 2001, at Al. Each of those four reporters has since been held in contempt and sentenced for publishing the foreperson's name, and three of them for attempts to contact her and other jurors--actions that could not affect "trial strategy" in any possible way.

The combination of underinclusiveness and overbreadth presented here is a common one in orders that fail to pass constitutional muster and should have the same effect in this case.

That is not to suggest that there could never be a limit imposed on post-verdict media-juror contact. Other courts have recognized that carefully limited restrictions based on the particular facts and circumstances presented might be permissible. *United States v. Antar*, 38 F.3d 1348, 1363-64 (3d Cir. 1994) (holding that prohibition against repeated interview requests fails "in the absence of findings that jurors were being harassed or that a threat of harassment was impending" and that restrictions against inquiry into juror votes should be supported by trial court's explanation for necessity of such restriction); *Journal Publ'g Co. v. Mechem*, 801 *F.*2d 1233, 1236-37 (10th Cir. 1986) (citation omitted) (overturning "sweeping restraint forbidding all contact between the press and former jurors without a compelling reason" but recognizing that trial court may inform jurors of right to refuse interview and instruct them "not to discuss the specific votes and opinions of noninterviewed jurors in order to encourage free deliberation in the jury room").

What is clear, however, is that the kind of ineffective yet overbroad restriction imposed by the trial court and expanded by the majority based on invalid animating principles cannot stand if the First Amendment is to be accorded any meaning whatsoever.

IV

One final point. The majority purports to base its decision to continue and expand the restrictions on the media's First Amendment rights on the protection of defendant's Sixth Amendment rights. However, it expressly rejects (correctly, I believe) the notion that the restraints are necessary to ensure an impartial and freely deliberative jury on retrial, the hook to the Sixth Amendment. The majority instead yokes its argument to *State v. Baker*, 310 N.J.Super 128, 708 A.2d 429 (1998), a capital case involving prosecutorial misconduct in which jurors' notes and charts from their guilt- phase deliberations were discovered by the State and then reported publicly through a newspaper reporter. **[280]** *Id.* at 131 & n. 1, 708 A.2d 429. In precluding the State from further pursuing the death penalty with

the empanelment of a new jury, the court carefully noted that it was the unique circumstances of the case--specific, articulable factors of prejudice directly caused by the State's misdeed--that made it a clear candidate for application of the fundamental fairness principle. *Id.* at 138-39, 708 A.2d 429. Moreover, the State's misconduct was the very reason that the defendant facing death was put in the additionally precarious position of losing his experienced trial counsel, who could no longer continue his *pro bono* representation; losing his original, carefully selected jury; and facing new jurors who would hear a "sanitized" version of the State's case without the benefit of exposure to vigorous cross-examination and the nuances of live witnesses' testimony. *Id.* at 134-35, 708 A.2d 429. The Appellate Division determined that "in the context of the magnitude of the prosecutorial misconduct here," *id.* at 136, 708 A.2d 429, and the "substantial[ ] and irremediabl[e] prejudice[ ]" the defendant would suffer in a penalty phase with a new jury, fundamental fairness demanded that the State be barred from further pursuing the death penalty. *Id.* at 139, 708 A.2d 429.

The *Baker* court did not fault, in the slightest, the media's actions: "I want to make it clear that the reporter's actions were not wrong which occurred here. Indeed, they were the vehicle by which the [prosecutor's] wrong came to light." *Id.* at 133, 708 A.2d 429. *Baker's* unique circumstances demanded invocation of the fundamental fairness principle against the State because of State misconduct amounting to "an egregious, intentional and intolerable" invasion into the secrecy of juror deliberations, which in fact unduly prejudiced defendant. *Id.* at 139, 708 A.2d 429. No constitutional fair trial rights were at stake, nor were the media's First Amendment freedoms.

In this case, on the other hand, it is the *media* that seeks to exercise its First Amendment right to access discharged jurors either on their initiative or on its own. No party presently before us has been accused of prejudicial misconduct involving an empaneled jury. Indeed, the sole and tenuous connection that the majority finds to *Baker* is the importance of secrecy to pro-

tect the sanctity of the jury process, *ante* at 221, 801 A.2d 274, a notion it outright *rejected* at an earlier portion of its opinion. *Ante* at 218, 801 A.2d 270.

The retrial will be an entirely new and distinct event, with both parties beginning on equal footing, with equal access to all information reported by the media. As noted above, the majority's fears that even lawful and fair media reporting about the deliberations of discharged jurors might give the State some added benefit is so remote a possibility as to be illusory. Broad restrictions against media access simply are not necessary. The new jurors, in a new venue, after searching *voir dire* will hear the case anew with their own ability to observe witnesses first-hand.

V

The outright ban on contact with discharged jurors is an unconstitutional prior restraint entered without regard to procedural due process of law. The minimal incremental potential impact of a former juror's statements on the State's retrial case, if any, is trivial in light of the extensive publicity about every other aspect of the case, from the killing of Carol Neulander and her husband's arrest and indictment through the gavel-to-gavel coverage of the first trial and beyond. Interviews with discharged jurors do not present "the kind of threat to fair trial rights that ... possess the requisite degree of certainty to **[281]** justify restraint." *Nebraska Press Assn, supra,* 427 U.S. at 569-70, 96 S.Ct. at 2808, 49 L.Ed.2d at 704. Even if media interviews with jurors presented a realistic threat to defendant in the form of an unfair State advantage on retrial, the order affirmed and expanded by the majority is unconstitutionally underinclusive and overbroad. Therefore, I dissent.

Chief Justice PORITZ joins in this opinion.

For affirmance as modified--Justices STEIN, COLEMAN, VERNIERO, LaVECCHIA, and ZAZZALI--5.

Concurring in part; dissenting in part--Chief Justice PORITZ and Justice LONG--2.

APPENDIX C

SUPREME COURT OF NEW JERSEY

M-148 September Term 2002
52,353
[Filed Sept. 18, 2002]

STATE OF NEW JERSEY,
Plaintiff,

v.

FRED NEULANDER,
Defendant-Respondent.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion of the Philadelphia Newspapers, Inc., for reconsideration of the Opinion is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 17th day of September, 2002.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

The foregoing is a true copy
of the original on file in my office

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

APPENDIX D

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
AM-216-01T1

STATE OF NEW JERSEY,
Plaintiff-Respondent,
v.

FRED NEULANDER,
Defendant-Respondent,

IN RE APPLICATION OF
PHILADELPHIA NEWSPAPERS, INC.,
Appellant.

Argued on an emergent basis November 28, 2001
Decided November 30, 2001

Before Judges Baime, Newman and Fall.

On appeal from Superior Court of New Jersey, Law Division, Camden County, 1-1993-06-00.

Warren W. Faulk argued the cause for appellant (Brown & Connery, attorneys; Mr. Faulk, on the brief).

Dennis Wixted argued the cause for respondent Fred Neulander (Sufrin, Zucker, Steinberg, Waller & Wixted, attorneys; Dennis Wixted and Jeffrey C. Zucker, on the brief).

Respondent State of New Jersey did not participate in this appeal.

The Reporters Committee for Freedom of the Press filed an *amicus curiae* brief.

PER CURIAM

For the purpose of this decision, we assume that the order from which this appeal is taken is interlocutory. We grant leave to appeal and summarily affirm.[1]

The record amply supports the judge's essential conclusion that interviews with discharged jurors and publication of their names would pose a clear and present danger to defendant's right to a fair trial. Although the authors of the Bill of Rights did not undertake to assign priorities as between the right to free speech and the right of a defendant to a fair trial, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561, 96 S.Ct. 2791, 2803-04, 49 L.Ed.2d 683, 699 (1976), we have historically recognized the exalted status of First Amendment freedoms in the constellation of constitutional values. But where, as here, First Amendment and Sixth Amendment values collide, our duty is to seek to alleviate the tension between these competing interests by permitting the entry of a carefully tailored order protecting a defendant against prejudicial pretrial publicity. *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600, 620 (1966) ("Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused."); *State v. Feaster*, 156 N.J. 1, 50 (1998) (articulating that "a trial court must observe significant precautions to minimize adverse pretrial . . . publicity that is capable of affecting juror perception of the case") (citing *State v. Williams*, 93 N.J. 39, 63 (1983)); *see also United States v. Cleveland*, 128 F.3d 267, 269 (5th Cir. 1997) *cert. denied, In re Capital City Press*,

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[1] We are unable to issue an opinion fully explicating our views because of the need to resolve the issues presented in an expeditious manner.

523 U.S. 1075, 118 S. Ct. 1518, 140 L.Ed.2d 670 (1998) (holding that the fact that a criminal trial is highly publicized justifies the imposition of an order prohibiting post-verdict interviews of jurors regardless of the willingness of jurors to be interviewed or the civility of the reporters seeking to conduct interviews)); *In re Globe Newspaper Co.*, 920 F.2d 88, 91 (1st Cir. 1990) (justifying the withholding of jurors' identities where there is "a significant threat to the judicial process itself"); *In re Dow Jones & Co., Inc.*, 842 F.2d 603, 610 (2d Cir. 1988) (holding that a court's order restraining juror communication with the press is justified where "there is a 'reasonable likelihood' that pretrial publicity will prejudice" the criminal defendant's Sixth Amendment right to a fair trial by an impartial jury). We deem it our responsibility consistent with the First Amendment to sustain all appropriate measures designed to ensure the fair and proper administration of the impending criminal trial. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508, 104 S.Ct.,819, 823, 78 L.Ed.2d 629, 637 (1984).

The United States Supreme Court recognized this overarching judicial obligation in *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 553, 96 S. Ct. at 2800, 49 L.Ed.2d at 694. There, the Court stressed that judges "'must take strong measures to ensure that the balance is never weighed against the accused . . . where there is a reasonable likelihood that prejudicial news prior to trial will", infect the fairness of the proceedings. *Ibid.* (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed. 2d 600, 620 (1966). The Court established a three-prong balancing test in its attempt to accommodate First and Sixth Amendment rights.

The factors that are to be considered are: (1) the nature and extent of pretrial publicity, (2) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity, and (3) how effectively a restraining order would operate to prevent the threatened danger. *Id.* at 562-68, 96 S.Ct. at 2804-07, 49 L.Ed.2d at 699-703. We apply that test here.

First, we note the immense publicity that attended defendant's trial. We also emphasize the unfortunate lack of restraint on the part of the media in refusing to abide by the terms of the Law Division's order. The sad fact is that the discharged jurors have been repeatedly harassed, and the identity of at least one improperly published despite the clear terms of the judge's decision.[2] Our system offers a litigant every reasonable opportunity to attack on appeal trial court orders thought or believed to be unfair. The fact that we have considered the present application on an emergent basis and have expeditiously disposed of the claims raised, despite the behavior of the media in this case, evidences the judiciary's willingness to consider such matters at a moment's notice. Our purpose is not to castigate the media. We merely recite this unfortunate history to show the strong likelihood that continued publicity predictably will impair defendant's right to a fair trial.

Although appellant asks us to consider separately the prohibitions against identifying jurors and interviewing them, we view the two as interrelated. It is unlikely that media accounts would name discharged jurors without further comment. The likelihood is that the deliberations of the discharged jurors would be discussed and published. The sanctity of the discharged jury's deliberations is critical to the judiciary's capacity to select a fair and impartial jury on retrial. Jury deliberations are not public. The singular vice of disclosure of prior deliberations is its capacity for destroying the ability of the jury on re-

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[2] We note the repeated and flagrant violations by the media of the order previously entered. Specifically, since the discharge of the jurors, several news organizations attempted to contact jurors and their employers by telephone, mail, and visits to their homes. In addition, jurors have reported that they have been harassed by news vans or reporters who have "remained parked outside their homes or other locations waiting for them to emerge." Moreover, the trial court indicated that "one television station broadcast footage of the jurors, including their faces, as they left the courthouse the day the mistrial was declared." Lastly, on November 16, 2001, appellant Philadelphia Inquirer published the name of the jury forewoman and an anonymous juror's remarks about the trial and the jury deliberations.

trial to deliberate on the issue of guilt or innocence free of extraneous influence. This potential for harm inheres in the subtly coercive effect the media's account of prior deliberations would undoubtedly have on the ability of the jury on retrial to be fair. Such mental conditioning would be antithetical to the untrammeled functioning of the jury. Although the Law Division judge emphasized the right of discharged jurors to their privacy, we perceive that guarding their anonymity rests upon a more compelling policy -- the need to insulate the jury on retrial from extraneous influences. Although "capital defendants . . . are not entitled to jurors are totally ignorant of the facts and issues of their cases," *State v. Harvey*, 151 N.J. 117, 211 (1997); *see also State v. Koedatich*, 112 N.J. 225, 268 (1988), the disclosure of the deliberations of the discharged jury would have a significant capacity to contaminate the future jury pool.

We are also satisfied that other remedial measures would not likely mitigate the effects of unrestrained pretrial publicity. The United States Supreme Court has suggested several alternatives to prior restraints, including: (1) change of trial venue; (2) postponement of the trial; (3) *voir dire* to screen out potential jurors "with fixed opinions as to guilt or innocence"; (4) the use of jury instructions that clearly emphasize the juror's sworn duty "to decide the issues only on evidence presented in open court"; and (5) "[s]equestration of jurors." *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 563-64, 96 S.Ct. at 2805, 49 L.Ed.2d at 700. None of these remedial measures would protect against the lurking dangers we perceive. It is unlikely that a change of venue would insulate a future jury from the contaminating effect of the publication of the deliberations of the discharged jury. It is equally unlikely that postponement of the trial would dilute the sensational impact of such media accounts. While a careful and exhaustive *voir dire* process might screen out jurors whose ability to be fair has been infected, we would be short on realism were we to leave defendant's fate to that remote possibility. Lastly, jury instructions and sequestration are not viable options. The judge cannot issue a cautionary instruction to

avoid media accounts of the discharged jury's deliberations because the jury pool at the retrial has not yet been selected and the identity of prospective jurors is unknown. Sequestration is equally impossible because the jury has neither been selected nor impaneled.

Finally, the restraining order entered effectively operates to prevent the threatened danger. While the prohibitions contained in the order are not foolproof, they substantially reduce the possibility that defendant's right to a fair trial will be impaired.

We have approached the problem presented based upon our common experience in conducting criminal trials. Perhaps someone might conjure up a better remedy from the vantage point of twenty/twenty hindsight. However, we cannot fairly say that the trial judge abused her discretionary powers.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

/s/ Jon Flynn
CLERK OF THE APPELLATE DIVISION

APPENDIX E

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CAMDEN COUNTY
CRIMINAL

STATE OF NEW JERSEY,
v.
FRED NEULANDER,

Indictment No. 1993-06-00

ORDER GOVERNING MEDIA COVERAGE DURING TRIAL PROCEEDINGS

THIS MATTER having been opened by the Court pursuant to "SUPREME COURT GUIDELINES for still and television camera and audio coverage of proceedings in the Courts of New Jersey," as revised on September 25, 1990, and the Court having given notice to all known interested media representatives, and a pretrial conference having been conducted by the Court on July 18, 2001, at which time the Court heard from all interested media representatives in attendance and consulted with the State and defense counsel, and for good cause shown;

IT IS on this 18th day of July, 2001,

ORDERED as follows:

1. All media representatives are expected to comply with the procedures set forth in the SUPREME COURT GUIDELINES for still and television camera and audio coverage of proceedings in the Courts of New Jersey as revised on September 25, 1990.

2. Trial will commence with jury selection on August 20, 2001 at approximately 9:00 am. in Courtroom 63 on the sixth floor of the Camden County Courthouse, 101 South Fifth Street, Camden, New Jersey, 08103. Jury selection will pro-

ceed thereafter in Courtroom 63 on August 21, 22, 23, 28, 29, 30, and 31 at 9:00 a.m. Jury selection will continue in Courtroom 33 at 1:30 p.m. on the afternoon of each of the aforementioned dates. Commencing on September 4, 2001, all live proceedings will be conducted exclusively in Courtroom 33, without any further use of Courtroom 63.

Jury selection is anticipated to conclude on or about October 12, 2001. Opening statements and witness testimony are expected to begin on October 15, 2001.

3. Seating for media representatives is limited to the front two rows. Renee Winkler of the Courier-Post will coordinate the 20 reserved seats in these two rows and assigned seats will be set aside for each of those 20 media representatives. Anyone not claiming that reserved seat by 8:50 a.m. will forfeit for the day.

4. Media representatives will have access to a vacant courtroom (Courtroom 44) on the fourth floor of the Camden County Courthouse. It is anticipated that a television monitor will be in place in Courtroom 44 to present the trial proceedings from a live fixed camera in the fourth floor courtroom for media representatives who cannot be accommodated in Courtroom 33. Members of the public will have access to both Courtroom 33 and Courtroom 44.

5. Live television and audio coverage will be permitted at trial subject to the provisions of paragraphs 6 to 19 below. Neither the jury nor spectators may be televised or photographed. The camera is to be directed to court activity in front of "the bar."

6. Court TV is designated as the network to handle the live television and audio work and is directed to make pool arrangements with all other interested media representatives to simultaneously feed all video and audio portions of the trial allowed by this Order.

7. Consistent with the standards contained in the SUPREME COURT GUIDELINES, pertaining to camera type

and placement, two (2) still cameras will be allowed in Courtroom 33 and may be used in the trial courtroom. Neither the jury nor spectators may be photographed. The still cameras are to be directed to court activity in front of "the bar." These designated cameras are not to be used in any other location in the Courthouse.

8. Newspaper editors shall decide among themselves how to coordinate still camera coverage and they are directed to disseminate all photographs they deem of publishable quality to all interest media agencies on a timely basis. They are to decide which of them will take photographs on any given day.

9. The still camera photographers shall be positioned in such position in Courtroom 33 as designated by the Court. The areas designated shall provide reasonable access to coverage. The still camera photographer shall assume a fixed position within the designated area, and once the photographer is positioned, such photographer shall not move about in any way as to attract attention through further movement. Still photographers shall not be permitted to move about in order to photograph court proceedings.

10. Broadcast media representatives shall not move about in the live courtroom while proceedings are in session, and microphones or taping equipment, once positioned as required by paragraph 5, shall not be removed during the pendency of the proceedings.

11. Photographic or audio equipment for radio broadcast and television coverage shall not be placed in or removed from the court facility except prior to commencement and after adjournment of proceedings each day, or during a recess.

12. No video or still cameras, of any kind, may be brought into the trial courtroom or in any other location in the Courthouse during the trial of this case except as specifically permitted by this Order. This direction may be relaxed in the event that there is a specific request to provide photographic coverage of proceedings other than the trial of this case.

13. Neither the identity nor descriptions that would reasonably identify any juror may be publicized, in any way, unless authorized by further Order of this Court.

14. All entrances to and exits from the Courthouse are to be kept clear by media representatives so as to allow free and open access.

15. Media representatives shall not contact or attempt to interview any juror or potential juror.

16. There should be no photographic coverage (still camera or video) of the defendant manacled or in any way showing him to be in custody.

17. There should be no audio monitoring of any conversation at the counsel table either between counsel or between counsel and client.

18. No photographs shall be taken in any of the hallways or corridors of the Courthouse. Photographs may be taken on the walkways outside the Courthouse as long as the entrances and exits from the building are not obstructed in any way.

19. All cell phones and pagers are to be turned off upon entry into the live courtroom. Any pager or cell phone which rings will be confiscated and will not be returned until the end of the day's proceedings.

20. Any questions pertaining to media coverage should be directed to Mr. Nicholas Carugno, Assistant Trial Court Administrator, who is the media liaison on behalf of the Court. Mr. Carugno may be reached at 856-225-7436.

/s/ Linda G. Baxter

LINDA G. BAXTER, P.J.Cr.

APPENDIX F

[Stamp: Received and Filed 08-31-2001]

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL
CAMDEN COUNTY

STATE OF NEW JERSEY,
v.
FRED NEULANDER,

Indictment No. 1993-06-00

ORDER

This matter having come on before the Court on the application of Philadelphia Newspapers, Inc., and The Associated Press for an Order vacating Paragraph 13 and amending Paragraph 15 of this Court's Order entered on July 18, 2001, and the Court having read and considered all matters submitted in support of and in opposition to said application, and good cause appearing;

IT IS, on this 31st day of August, 2001 for the reasons set forth on the record

ORDERED:

(a) that the Motion of Philadelphia Newspapers, Inc. and The Associated Press to vacate Paragraph 13 of the July 18, 2001 Order is **DENIED**;

(b) that the Motion to amend Paragraph 15 is **DENIED** as requested, but Paragraph 15 of the July 18, 2001 Order is amended to read as follows: "Media representatives shall not contact or attempt to interview any juror or potential juror; however, subsequent to entry of the verdict in this case petition-

ers may apply to this court for relaxation of the provisions of this paragraph".

(c) that the application of Philadelphia Newspapers. Inc. and The Associated Press for a stay of Paragraph 13 pending appeal is **DENIED.**

/s/ Linda G. Baxter
LINDA G. BAXTER, P.J.Cr.

APPENDIX G

[Stamp: Received and filed 11-19-01]

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL
CAMDEN COUNTY

STATE OF NEW JERSEY,
v.
FRED NEULANDER,

IN RE APPLICATION OF
PHILADELPHIA NEWSPAPERS, INC AND
THE ASSOCIATED PRESS

Indictment No. 1993-06-00

ORDER

This matter having come on before the Court on the application of Petitioners, Philadelphia Newspapers, Inc. and The Associated Press for an Order vacating or relaxing the provisions of Paragraph 15 of this Court's Order entered on July 18, 2001, as amended by the Order of August 31, 2001 and the Court having considered all matters submitted in support of and in opposition to the motion, and for the reasons set forth on the record in deciding the application of NBC Television Network and WCAU on November 14, 2001;

IT IS, on this 16th day of November, 2001 **ORDERED** that the application of Petitioners is denied. Paragraphs 13 and 15 of this Court's Order of July 18, 2001 remain in full force and effect, and the news media are prohibited from conducting interviews of any discharged jurors on this case and from publishing the identity or descriptions that would reasonably identify any discharged juror.

/s/ Linda G. Baxter
LINDA G. BAXTER, P.J.Cr.

I hereby consent to the
form and entry of this Order.

/s/ [illegible]
Attorney for Defendant

APPENDIX H

SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY - LAW DIVISION
INDICTMENT NO. 1993-06-00

STATE OF NEW JERSEY,
Complainant,
v.
FRED NEULANDER,
Defendant.

TRANSCRIPT OF MOTION
[Excerpts]

Place: Hall of Justice
Camden, New Jersey
Date: August 31, 2001

BEFORE: Honorable Linda G. Baxter, J.S.C.

* * * *

THE COURT: Okay. The Associated Press and the Philadelphia Inquirer today asked this Court to vacate paragraph 13 of its order of July 18 which provides as follows.

"Neither the identity nor the descriptions that would reasonably identify any juror may be publicized in any way unless authorized by further order of this Court."

For the following reasons the Court declines to vacate its prior order. First, I believe that the Supreme Court guideline issued in September of 1990 [45] bars the identifying of a juror by photographic methods. I, therefore, find that to accomplish indirectly what the Supreme Court has barred directly makes no sense and, in fact, should not be permitted.

Moreover, the courts and even -- particularly the New Jersey Supreme Court in the case of State -vs- Williams have made

it clear that courts have a responsibility to fairly administer justice and that the responsibility to preserve the integrity of the jury and minimize the danger that prejudice will infiltrate the judicatory process is at its peak in cases involving the death penalty.

The Court in Williams articulated a test or standard to be applied when a Court is asked to determine whether any limitation on First Amendment freedom will be tolerated or accepted and that test was set forth as follows.

Essentially the Court would have to be clearly convinced that but for the entry of that order there would be a reasonable prospect of impairing the defendant's right to fair and impartial jury. And encompassed with that -- within that is the Court's obligation to determine whether any less intrusive or less restrictive means are available to accomplish the goal.

[46] In this instance the right of a criminal defendant to a fair and an impartial trial is, of course, guaranteed him. That right can never be greater than it is in a trial such as this one where a person is literally, as Mr. Neulander is, on trial for his very life.

The order that I have entered I believe is narrowly drawn to accomplish that purpose. The Court did not and would never even remotely consider barring the media from the voir dire process. There have been, as I indicated earlier, numerous representatives of the press in the courtroom the minute the voir dire begins with each juror and they stay through the entire proceeding. I believe that the limitation on the printing of a name is a necessary ingredient of getting impartial -- I'm sorry -- of getting honest and truthful and complete answers from jurors.

I mentioned when we began this morning the very probing and potentially embarrassing questions that could be asked of jurors and that will be asked of the jurors on the questionnaire. And I believe that if a juror knows that his name will be published or if someone tells him that another name was published, that we will not ever receive the types of honest answers during

voir dire that Fred Neulander is [47] constitutionally entitled to receive.

There are other methods that are sometimes used to minimize prejudice in the jury selection process; one of those is a change of venue, for example, where there is inflammatory pretrial publicity. A change of venue doesn't resolve this problem because if the media coverage has the effect of causing a juror to be less than fully honest, that is going to occur regardless of what county the trial is conducted in.

I also have considered the option of having the juror come to sidebar whenever there is anything that might be sensitive. Although I utilize that procedure when necessary, as I've indicated earlier, I think it would be counterproductive in this case because I think the press would in those circumstances hear far less than it now hears with respect to the juror's answers.

So for those reasons I find that there is a compelling governmental interest here, compelling state interest and that is to guarantee the man on trial a fair and an impartial jury.

I find that the limitation which I have imposed is narrowly drawn. I do not find that there are any less restrictive alternatives. I have read all [48] the cases cited by the petitioners today with the exception of the First Circuit case which I was not able to read because it wasn't cited in the brief.

But the cases that I have read persuade me that there is no United States Supreme Court opinion which directly deals with the issue of releasing jurors' names to the public. I'm satisfied that the case of State -vs- Williams allows limited limitations or limited curtailment of First Amendment rights where those limitations are vitally necessary for the protection of a defendant's right to a fair trial.

I am clearly convinced that but for the limitation that I have imposed there would be a threat to the honesty of jurors' answers. That is something completely incompatible. If we received dishonest answers from jurors, that is completely incompatible with this defendant's right to a fair trial.

Accordingly, relying on the test set forth in State -vs- Williams, relying generally on the residual authority that is contained within the guideline itself, and I'm referring to paragraph 10(d) which provides "it is incumbent upon the Court and trial judge in supervising media coverage to insure the fair administration of justice and to issue such orders as are required to insure this goal."

[49] So relying on State -vs- Williams, relying on the residual authority under the guideline, and relying on what I mentioned earlier which is the prohibition on visual identification of jurors, all of those things together persuade me that the order that I entered was narrowly tailored to accomplish a compelling state interest.

I find, therefore, that the limitation that is contained within paragraph 13 is a valid restraint, a necessary and vital one, and the Court declines to vacate it.

With respect to paragraph 15, the Court believes that interviewing of a juror at the end of the trial might present different considerations than interviewing a juror during the course of a trial. In other words, the interviewing of a discharged juror is very different -- excused juror is different from interviewing the jurors after the verdict has been rendered.

I do not think that it makes good sense as a Court to issue an order indicating what I will do three months from now. You may renew the application upon the return of a verdict and I'm not prejudging today or indicating today whether I will change it or not change it. I simply am saying I did not intend by this order **[50]** to encompass that which would happen after a verdict because the order simply indicates order governing media coverage during trial proceedings. I did not intend to limit what could or could not occur once the verdict was rendered. So, therefore, you may apply to the Court on emergent basis at the time the jury renders its verdict. If appropriate I will relax the order at that time. There might be considerations that would cause me to relax it. There might be considerations that would

cause me not to do so. And I don't know what those would be today.

I, therefore, agree paragraph 15 should be modified so that it will say "media representatives shall not contact or attempt to interview any juror or potential juror prior to the entry of a verdict." The petitioners may apply to the Court for relief at the time of the verdict to ascertain whether interviews may be permitted at that time. That is the wording which I believe is appropriate. I also believe that there should not be interviews of jurors who are excused because they do not qualify.

If a juror is excused and is then interviewed when he or she leaves the courtroom, I believe the same problems would occur as I mentioned earlier; that is, they would not give truthful, honest and complete **[51]** answers to the questions when interviewed because they don't know when they're giving those answers whether they're going to be excused or not. Therefore, the chilling effect on juror honesty would be present. Therefore, I find that there should not be any attempt to interview a juror prior to the verdict being received which means, therefore, that a juror who is excused after his or her individual voir dire should not be contacted or not be interviewed by the media in any way.

Are there any questions?

* * * *

APPENDIX I

SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY - LAW DIVISION
INDICTMENT NO. 1993-06-00
A.D. NO. #_____

STATE OF NEW JERSEY,
Complainant,
v.
FRED NEULANDER,
Defendant.

TRANSCRIPT OF MOTION

[Excerpt]

Place: Hall of Justice
101 S. Fifth Street
Camden, New Jersey
Date: November 14, 2001

BEFORE: Honorable Linda G. Baxter, P.J. Cr.

* * * *

THE COURT: Okay. The Court has had the opportunity to hear today the arguments of NBC Television and WCAU-TV seeking relaxation of two provisions of this Court's previous orders. One barred the publication of the jurors' names and the other [27] prohibited any attempts to contact or interview the jury. I will not express an opinion on what my ruling would have been had this trial concluded in a verdict because that's not the case and I don't want to render an advisory opinion on what I might have done. So my ruling today should be understood as encompassing only the procedural posture in which the Court presently finds itself and that is that I will or another judge will but it will be me retry the case at some appropriate point in time

and at that point a new jury will have to be summoned. I agree with you that there might be different considerations were this a jury that was completely discharged and no further proceedings would be held. Clearly that is not the case. I believe that Fred Neulander received a fair trial in this courtroom and he certainly has the right to a fair trial again and for the reasons that I've identified in the course of the argument this morning, I do believe that if there were to be a relaxation of either of these two provisions it has the capacity to undermine or weaken his right to a fair trial and specifically I find that jurors who are summoned for possible jury service, whether it be in this county or in another county, will know that they run the risk of having **[28]** their names published and they run the risk of having their private deliberations in the jury room discussed, analyzed, broadcast, or in other ways disseminated and I think that those things do have the capacity to chill the free exchange of ideas in the jury room and will also have the capacity to restrict the jury pool that is available for this case.

There is no law in the State of New Jersey which directs courts to publish the names of jurors, there is no controlling authority, and, therefore, I find that it falls to me to try to fashion remedies which best protect the right of Fred Neulander to a fair trial, particularly in this case where it is a capital case. It remains a capital case. Nothing has changed that in any way. And I agree with the defense that there is certainly the potential for an interference with his right to a fair trial. That is my ruling today, it was my ruling back in July and August, and nothing has really changed that causes me to reconsider the ruling that I made then. I think that it was a correct ruling then and as I said there will be a retrial and, accordingly, for those reasons the motion for relaxation of this Court's order is hereby denied. You have the right to review it in the Appellate Division.

* * * *

APPENDIX J

[Linda G. Baxter's Chambers letterhead]

November 17, 2001

James M. Flynn, Clerk
Superior Court of New Jersey
Appellate Division
PO Box 006
Trenton, NJ 08625-0006

Re: State of New Jersey v. Fred Neulander, Ind. No. 1993-06-00; *In the Matter of the Application of NBC Television, WCAU, the Philadelphia Inquirer and the Associated Press Seeking Permission to Identify and Conduct Interviews With Jurors*
Docket No. A -

Dear Mr. Flynn:

Part D of the Appellate Division is considering an appeal by NBC, WCAU-TV, the Philadelphia Inquirer and the Associated Press, challenging my Order of November 14, 2001, which prohibits the news media from contacting discharged jurors, attempting to interview them or publishing their names.

I am submitting this letter pursuant to R. 2:5-1(b) to amplify the reasons why I denied relief to the appellants, and I request that you forward this letter to the judges on that panel who are hearing the appeal.

At the time of the hearing on November 14, I expressed concern that media attempts to contact jurors after the trial and the publication of juror interviews would interfere with the selection of a fair and impartial jury when this capital case is retried.

At the time of the hearing, I was unaware that despite my Order to the contrary, news organizations had already followed jurors home, knocked on their doors and left letters in their mailboxes. Some jurors were contacted more than once by the same news organizations, either by repeated telephone calls or repeated visits to the jurors' homes. Some jurors reported that news vans or reporters in cars remained parked outside their homes or other locations waiting for them to emerge. One juror told me she requested stepped-up police patrols of her home.

Other jurors have reported to me that news organizations have repeatedly telephoned their employers. Such contacts have included repeated telephone calls to both the immediate supervisor and to the public information officer as well as the use of e-mail sent to the employers, all of which was in an attempt to contact the jurors.

In addition, one television station broadcast footage of the jurors, including their faces, as they left the courthouse the day the mistrial was declared. This violated one of the provisions of my Order of July 18, 2001, a copy of which is enclosed. I am also enclosing a copy of my Order of August 31, 2001, which was entered following a hearing conducted on August 17, 2001, which declined to modify the challenged provisions of the prior order.

Finally, on November 16, 2001, the Philadelphia Inquirer, a party to this appeal, published the name of the forelady of the jury, in violation of another portion of my July 18, 2001 Order.

The above information is derived from telephone calls I received from six different jurors objecting to the efforts of news organizations to contact and interview them. Some jurors called me more than once.

If there is anything further I can provide, please advise.

Very truly yours,
/s/ Linda G. Baxter
LINDA G. BAXTER, J.S.C.

cc: Dennis Wixted, Esq.

Jeffrey Zucker, Esq.
James Lynch, Esq.
Carolyn Short, Esq.
Elizabeth Abrams, Esq.
Warren Faulk, Esq.

APPENDIX K

NOT FOR PUBLICATION WITHOUT APPROVAL OF COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAMDEN COUNTY

IN THE MATTER OF

JOSEPH GAMBARDELLO
GEORGE ANASTASIA
DWIGHT OTT
EMILIE LOUNSBERRY

CHARGED WITH CONTEMPT

Docket No. L-7869-01

OPINION

* * * *

Decided: June 17, 2002

Davis, Theodore Z., P.J.Ch.

This matter has come before the court by an Order to Show Cause dated December 3, 2001, and an amended Order to Show Cause dated March 5, 2002, each of which requires the respondents to show cause why they should not be held in contempt of Orders executed by The Honorable Linda G. Baxter, the trial judge in State v. Neulander. The court orders in question are dated July 18, 2001, and November 14, 2001.

In response to the Order to Show Cause, the respondents have presented this court with primarily six questions.

1. Whether the Orders are impermissibly vague and therefore cannot be the subject matter of Contempt proceedings.
2. Whether the respondents had the required notice of the existence and substance of the court's orders.
3. Whether the State is guilty of selective enforcement, such that the respondents' entitlements to the equal protection of the laws have been violated and their prosecution for contempt barred.
4. Whether the Supreme Court's ruling that paragraph 13 of the trial court's order is constitutionally infirm bars their prosecution notwithstanding that their conduct preceded the Court's ruling.
5. Whether the respondents have been identified beyond a reasonable doubt.
6. Whether, in light of their First Amendment rights as media respondents, their conduct rises to a level which would support a charge of wilful disobedience of a court's Order.

Contempt is "a defiance of governmental authority." *N.J. Dep't of Health v. Roselle*, 34 N.J. 331, 337 (1961). Under our system of government, there exists only three constitutionally recognized co-equal branches of government, the respect for which is the life-blood of their virtual existence. That respect must come from the populace which has created our system of government. Respect in this regard does not mean that a branch of government cannot not be challenged, for the operations of the courts are matters of utmost public concern. *See e.g., Landmark Communications, Inc. v.Virginia*, 435 US 829, 839, 98 S Ct. 1535, 56 *L.Ed* 2d 1, 10, (1978). Also, our history tells us that the present-day strength of our government is the outgrowth of challenges made over the past several hundred years. *See Sheppard v. Maxwell*, 384 US 333, 350, 16 L. Ed. 2d 600, 613 (1966). Respect does mean, however, that the challenges should and must be made in a fashion which will not have the

terrible effect of destroying the system we have fortunately maintained for so many years. The branch of government and the system which is being challenged in this case is the judiciary. The members of the populace who, by their conduct, are challenging the judicial branch of government, are the above-named respondents. This court must be aware and is in fact aware that the "unqualified prohibitions laid down by the framers [of our constitution] were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." *Bridges v. California*, 314 U.S. 252, 265 62 S.Ct. 190 (1941). Where, as here, there exists tension between the recognized first amendment rights of the press and the responsibility of the judiciary to provide the populace a secure and fair judicial system, a line must necessarily be drawn so that confidence in the system and the public trust can be maintained.

I
THE ORDERS

The relevant portions of Judge Baxter's July 18, 2001 order state:

> 1. All media representatives are expected to comply with the procedures set forth in the SUPREME COURT GUIDELINES for still and television camera and audio coverage of proceedings in the Courts of New Jersey as revised on September 25, 1990 . . . .
>
> 13. Neither the identity nor descriptions that would reasonably identify any juror may be publicized, in any way, unless authorized by further Order of this Court.
>
> 15. Media representatives shall not contact or attempt to interview any juror or potential juror.

The Philadelphia Newspapers, Inc., (PNI) the company that publishes *The Philadelphia Inquirer*, which was not made a party to this action, and which is the employer of the respondents filed motions with the trial judge to amend or vacate paragraphs 13 and 15 of the Order. The court scheduled a hearing on the motion for August 31, 2001. In the interim, PNI sought leave to file an interlocutory appeal of that Order, but leave was denied because the trial judge had scheduled the matter for a hearing on August 31, 2001. On August 31, 2001, PNI's motion to vacate or modify the order was denied as to paragraph 13, but modified as to paragraph 15 to read, "Media representatives shall not contact or attempt to interview any juror or potential juror: *however, subsequent to entry of the verdict in this case petitioners may apply to this court for relaxation of the provisions of this paragraph.*" (Amendatory language and punctuation is underscored).

On November 13, 2001, after seven days of deliberations, the jury informed the court that it was hopelessly deadlocked. The court declared a mistrial but kept the July and August prohibitions against the media in place. In response to motions filed by the media the trial court entered an Order supplementing its original restrictions against media contact with the jurors who served during the trial. In that amended order, the trial court expressly preserved paragraphs 13 and 15 of the July 18, 2001 Order and, in a separate clause, extended application of certain restrictions to discharged jurors:

> IT IS, on this 14th day of November 2001, it is hereby ORDERED that the application is DENIED. The Court's Order dated July 18, 2001, as modified by Order dated August 31, 2001, remains in full force and effect, and all media representatives are prohibited from conducting interviews with any discharged juror in this case, and are prohibited from publishing information identifying any discharged juror in this case.

On November 14, 2001, a hearing was conducted because of media requests that the court relax its restrictions. Judge Baxter denied PNI's request. On November 16, 2001, PNI sought leave to take an emergent appeal of the November 14, 2001, order. On November 30, 2001, the Appellate Division entered a unanimous *per curiam* opinion denying PNI's request for leave to appeal. On April 22, 2002, the Supreme Court entered an Order affirming paragraph 15 of Judge Baxter's order, which prohibited the media from contacting discharged jurors or attempting to interview them, but overruling paragraph 13 which prohibited the publication of jurors' names. These are the orders and dispositions which give rise to this, litigation.

II

VAGUENESS OF COURT'S ORDERS

The Orders executed by Judge Baxter were provided to all counsel. They became the subject matter of two appeals to the Appellate Division and two denials from that Division. Also, they became the subject matter of the appeal to the New Jersey Supreme Court, and finally the subject matter of the Supreme Court's ruling. Interestingly, the Orders are now being argued by counsel for the respondents as being unenforceable because of vagueness.

This court is mindful of the judicial policy underlying the doctrine of vagueness, especially in the context of the exercise of First Amendment freedoms. Our United States Supreme Court has spoken with regard to this doctrine.

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise

> almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

N.A.A.C.P. v. Button, 371 U.S. 415,432-33 (1963) (citations omitted).

No one has or could allege that the July 18, 2001, Order as modified by the Order dated August 31, 2001, is in any way vague. Those Orders were executed prior to the empaneling of the jury. The alleged vagueness is created by counsel construing the words "discharged jurors" in the November 14, 2001, Order, as modifying the words "contact or attempt to interview" any juror or potential juror in the July/August Orders.

Temporally, it is abundantly clear that at the time the court executed the July/August Orders, the court was concerned with a jury to be empaneled and utilized during the course of the Neulander trial. The word "potential" relates to persons not yet selected. The word "juror" relates to a person who would have been selected. It cannot be disputed that the cause for the November modification was the fact that there was a mistrial, the jurors had to be discharged and the probability of a retrial was quite real. In November 2001 the court was not concerned with potential jurors, it was obviously concerned with those who had served and who had been discharged. The November Order clearly states that everything stays the same except the label to be given to the jurors. They became discharged jurors. All other aspects of the Orders were to "remain[s] in full force and effect."

It is true that the modified Order prohibits all media representatives from *conducting interviews* (words not used in the prior orders) with any discharged jurors, but the words "conducting interviews" do not modify the language, "remaining in full force and effect," which relates to the July/August Orders. Counsel suggest that the November Order should have specifically placed its proscriptive words in its modification rather

than rely upon the language of "remains in full force and effect" Because this was not done, it is alleged that vagueness has been created and a finding of contempt, therefore, cannot be sustained.

Yes, great precision is required, especially when First Amendment rights are involved. *See State v. Jahr*, 114 *N.J. Super* 181, 192 (Law Div. 1971) (citations omitted). However, the precision about which our courts have spoken doesn't mean that it must, by analogy, have the tensile strength of a spider's web, but must be such that the power and the strength of the First Amendment, which is accorded to the media, is not by the exercise of sound reason vitiated. And, in the exercise of this reason, care must be given to the competing right and strength of the judiciary. The tension between the two must be resolved while at the same time protecting each. Most assuredly, a feat of legerdemain, as presented in the trial briefs of the respondents, cannot be the basis for resolving the competing interests between the media and the judiciary. Sound reasoning, historical and legal experience is the better measure. A judicial order becomes the law of a case. Its spirit must control the letter where a literal rendering will lead to a result that is not in accord with its purpose and design, *See Wnuck v. N.J. Div. of Motor Vehicles*, 337 *N.J. Super.*, 52, 58 (App. Div. 2001); *Caputo v. The Best Foods*, 17 *N.J.* 259 (1955). The sense of the Orders and indeed a normal and unstretched reading of the language utilized by the court has not escaped the eyes of the Appellate Division or the New Jersey Supreme Court. There isn't a legitimate issue of vagueness.

III

NOTICE AND KNOWLEDGE OF COURT'S ORDERS

The respondents have argued that the State has not shown by the requisite proof that the respondents had actual notice of the court's prohibitions. The respondents correctly argue that persons charged with contempt, as in these proceedings, are entitled to the traditional protections afforded defendants in criminal proceedings. *See In re Buehrer*, 50 N.J. 501, 515-516

(1967). These respondents are presumed innocent, and the Attorney General, the person selected to prosecute the charges, must prove the charges beyond a reasonable doubt. *Id.; see also In re Daniels*, 118 *N.J.* 51, 69 (1990), *cert. denied*, 498 U.S. 951,112 S.Ct. 371, 112 L.Ed.2d 333 (1990); *Essex County Welfare Bd. v. Perkins*, 133 *N.J. Super.* 189,195 (App. Div. 1975), certification denied by, 68 *N.J.* 161 (1975). Under this panoply of traditional protections exists a requirement, imposed upon the prosecution, that the alleged perpetrators' acts or omissions were accompanied by a *Mens rea*, a willfulness, an indifference to the court's command or a specific intent to violate Judge Baxter's orders. *In re Yengo*, 84 *N.J.* 111, 133-134 (1980); *New Jersey Dep't of Health v, Roselle*, 34 *N.J.*,331, 337 (1961).

There is absolutely no doubt in the mind of this court that the respondents had actual knowledge of the restrictions imposed by the court and the basis for those restrictions. Before Judge Baxter could hear PNI's requests for modification or vacation of her Orders, PNI made an application for leave to appeal on August 23, 2001. Of course, the conduct of ones' employer in this regard, without more facts, will not constitute proof beyond a reasonable doubt that their employees -- their staff writers -- had knowledge of the ramifications of the appeals, although common sense would clearly indicate that staff writers for the media would be well aware of what was going on in such a celebrated case. This is especially so if their ability to perform their tasks as reporters has been limited.

However, once the jury was empaneled on October 15, 2001, respondent George Anastasia published in *The Inquirer* his article (P-4 Ev.) about the case and the trial judge's "unusual edict." It reads in pertinent part as follows:

> Although their names were mentioned in open court yesterday, [Judge] Baxter has barred the media from publishing them or any other information that might disclose the jurors' identities. Her unusual edict,

> which was challenged by The Inquirer and the Associated Press, has been upheld by the Appellate Division of Superior Court.

It is reasonable to infer from the article that Anastasia was in court because he mentions that the jurors' names were mentioned in open court, or he was informed of these facts by Emile Lounsberry who, by the evidence, was stated on the first row in the court room. Regardless of which scenario is applicable, the article clearly indicates that the author was informed of the restrictions and had enough knowledge to describe the court's action as "unusual." Anastasia and Lounsberry even spoke about PNI's appeal and the appellate court's affirmance of Judge Baxter's Orders. Of course if they knew what they were writing about, they knew about the restrictions which were the only points on appeal. Also, there are no facts before the court from which the court can reasonably conclude that Anastasia and Lounsberry deny authorship of this article. The evidence only goes in one direction. The respondents, Anastasia and Lounsberry crafted the article, had it published, and therefore, in writing publicized that it was produced by them. Additionally, the court finds as a fact that Anastasia left his business card (P-16 Ev.) with witness, Charles J. Woods, (Woods) the stepfather of forelady, Coleen Darnell. Anastasia was even questioned by Woods when he asked Anastasia, "[w]hat part of judge Baxter's Order didn't you understand?". From these facts, it is the conclusion of the court that these two respondents had complete knowledge of Judge Baxter's Orders beyond any doubt.

On November 14, 2001, Lounsberry authored an extensive article, P-5, Ev., about the trial and its subsequent mistrial. She wrote:

> In an extraordinary order, [Judge] Baxter barred reporters from attempting to contact any jurors, although she did not bar jurors from discussing the case.
>
> A hearing on the order is set for this morning.

At the end of her article, she left her e-mail address. Additionally, she stated that "[c]ontributing to this article were Inquirer staff writers George Anastasia, Joseph A. Gambardello and Dwight Ott." All are respondents in this case. Clearly, this is evidence of absolute knowledge of the judicial restriction. The article described Judge Baxter's order as being "extraordinary." It stated that Judge Baxter's order "barred reporters from attempting to contact any jurors...." No one can deny that this part of the article shows that the writer and contributors knew that the court had restricted the right of the media to even attempt to contact any juror. The question left is who wrote the article and also contributed to its substance. Respondents, Lounsberry, Anastasia, Gambardello and Dwight Ott informed the public in writing that they were responsible for the article. This written statement, P-5, Ev., which has been admitted into the record, and the court thereby informed of its authorship, has a greater degree of permanency and reliability then any oral statement of a witness. An oral statement, is more susceptible to the frailties of human nature unless recorded in some fashion. No such oral statement has been made, but the written statement remains intact. This court must again state that no evidence has been presented from which the court can find that any of the respondents have denied authorship or contribution to the article.

There was additional evidence in the record from which the court can find that Ott was aware of the court's restrictions. When Ott went to the residence of the forelady of the jury, Coleen Darnell, he identified himself by wearing a badge which stated, "The Philadelphia Inquirer," and also informed witness, Alicia Keenan, the friend of Darnell, who he was. When Keenan asked Ott whether he knew of the court's Orders, Ott replied that "[i]t's a New Jersey Order, this is Pennsylvania," implying that he didn't have to obey it if he were in Pennsylvania. There are no facts in the record from which this court could draw a different inference. As the trier of fact, this court

is completely satisfied, beyond any doubt, that the four respondents had actual knowledge of the court's restrictive order.

In conclusion, it is the finding of this court that each of the four respondents had actual knowledge of the Orders of Judge Baxter which restricted the media from publishing the names of jurors or from contacting jurors or attempting to interview them.

IV
SELECTIVE ENFORCEMENT

The respondents contend that contempt cannot be sustained because the State has engaged in selective enforcement in violation of their equal protection rights. The record before the court is extremely barren of facts from which the court can make a reasonable judgment as to the viability of the asserted claim. The only evidence presented was the testimony of the juror George Gilch, who stated that two telephone calls were made to his telephone, and that from his telephone ID mechanism he could discern that the calls came from the New York Times, that he did not speak to anyone and did not take down the telephone number. The party who is asserting the defense has the burden of proof, at which point, if the evidence is sufficient, the burden may shift to the state to refute a selective enforcement defense. *United States v. Berrios*, 501 F.2d 1207, 1211, n. 4 (2d Cir. 1974). The respondents have failed in carrying their burden. The above evidence does not shift the responsibility to the state.

V
RESPONDENTS' IDENTIFICATION

Counsel argue that the identifications of the respondents do not rise to the level of proof beyond a reasonable doubt. None of the respondents, but Ott, were identified in court, although all were present in the courtroom during the course of the trial, but not at counsel's table. The manner by which and the factors which may be used to identify a person can be limitless. As to Ott, the testimony of Keenan was that she observed the witness

for over a period of 40 minutes at the front door of the home of the forelady of the jury, Coleen Darnell, observed him across the street from Darnell's home, observed and spoke to him while he was in his car, Ott told her who he was, that she was as close as three feet from him on two occasions, observed an identification tag or badge with the words "The Philadelphia Inquirer" on it and that she discussed with Ott the propriety of his trying to contact Darnell. This undisputed testimony, when coupled and even when not coupled with the published articles, that an employee of PNI, named Ott, attempted to contact Darnell, is compelling with regard to Ott's identification. There was no hesitancy in identifying Ott in court as a light brown skin African-American man, who was thin, with a bushy mustache and about six feet one inch in height. Keenan's in-court identification was the same as given out of court, even though this court noticed that Ott had changed his appearance somewhat from the day he was previously in court and the date of this hearing. The witness, Keenan, was not present at the prior court appearance. On the prior appearance, Ott had a substantial quantity of hair on his head in what may be called an Afro style. During this hearing, at which Keenan identified him, his head was clean shaven. Notwithstanding this alteration, again, there wasn't any hesitancy in Keenan identifying Ott as the person with whom she had spoken and who she had seen at Darnell's home. From the testimony of juror, Darnell, she likewise stated that the person Keenan saw and spoke with at her door and in the street was the person both of them observed at the same time. Keenan had told Darnell the name of Ott after she spoke with Ott and after Ott had identified himself. Keenan became involved in this entire episode at the request and because of the anxiety of Darnell about speaking with the media.

Counsel criticizes the in-court identification of Ott because he was the only African-American in the public portion of the courtroom, and because the court, at the beginning of the trial, ordered all counsel to get the parties into the courtroom so that the case may proceed. The court did not, of course, require any

respondent to testify. From where any respondent was seated, no uninformed person could distinguish them from any other member of the public. The courtroom was substantially full. Counsel for Ott asked him to stand after Keenan had identified him, and Ott certainly matched the description given by the witness both in and out of court and prior to his being asked to stand by his attorney. The hair of Ott apparently was not a significant factor because he had a hat on, which was described by the witness, whenever Darnell and Keenan saw him. Of course, he did not have a hat on in the courtroom.

From the totality of the evidence, it is the opinion of the court that the Deputy Attorney General has established beyond any doubt, not just a reasonable doubt, that the respondent Ott was the person who attempted to contact Darnell, visited her home, knocked on her door, spoke to her, left an envelope with her name on it, refused for over an hour to leave the area of Darnell's home, parked his car across the street, as did another person in a car with a camera, and informed Keenan that he couldn't leave the area until he got a call from his editor.

As to Lounsberry, her identification is likewise certain and compelling. Lounsberry left or caused to be left on the door step of juror, Nancy Karsner, an envelope and letter with a *signature*. (P-11 Ev.) The letter identified its author and sought an interview with Karsner. It reads as follows:

> Dear Juror:
>
> I have been a staff reporter at The Philadelphia Inquirer for 19 years. I am the paper's legal affairs reporter, and I have spent most of my career in journalism covering trials and writing about the law. As a reference I am the blonde woman sitting in the first row of the press section in the courtroom.
>
> *I, or one of my colleagues*, would very much like to interview you regarding your decision in the Neulander trial, If you would agree to be interviewed, I certainly would be agreeable to not printing your name

if that is your wish. I have always found that jurors work very diligently and try very hard to make the right decisions in cases and hopefully you will be willing to share with the public your thoughts on this very difficult case.

As I'm sure you're aware from family or friends, there has been a lot of "talking head" commentary out there -- much of it based on speculation and misinformation -- and I wanted to highlight that The Philadelphia Inquirer has not engaged in that. We've fairly and accurately reported the story. I also hope someone saved you my story from Monday, Nov. 12, where I wrote about the pressures on juries in high-profile cases. My point is this: whatever you do in this case is going to be second-guessed and analyzed on TV and radio -- probably even on Sports Talk Radio. Your work in this case has been too important for that. So why not talk to a respected news organization that will fairly and accurately report how the case was resolved?

Thank you for considering my request. I can be reached in the office at 856-779-3863, on my cell phone 609-217-8316 or by e-mail at elounsberry@phillynews.com.

Sincerely,

Emilie Lounsberry

(emphasis added).

Lounsberry left or caused to be left the same type of letter, all originals and live-signed, (P-14a & 14b-Ev.), at the home of juror, Darnell, at the home of juror, George Gilch, (P-13a & 13b-Ev.), and another letter, (P-15a & 15b-Ev.) at the New Jersey residence of Darnell.

In addition to leaving or causing letters to be left at the homes of various jurors, which letters had as one of their obvious purposes, the identification of the author, Lounsberry telephoned the home of juror, Karsner, on the same day the jury

was discharged. However, Karsner was not at home. Karsner testified, and this court finds as a fact, that because she had received the letter, had thought the media was not to contact her, because she didn't want to be bothered, and because a male reporter had knocked on her door seeking an interview, she called Judge Baxter for advice. After the conversation with Judge Baxter, Karsner wrote what she would say in her return call to Lounsberry. (DL-1 By.). The message she left Lounsberry was as follows:

> Under no circumstance do I want you to contact me again. Do not come on my property or near my house at all. Do not approach me or any member of my family. If you continue to do so, I will consider it harassment. Pass it on to staff

On November 14, 2001, Karsner received a return call from a person who identified herself as Lounsberry. Karsner testified, and this court finds as a fact, that this person stated, "I'm just trying to do my job. If you change your mind, please call me."

Counsel for the respondents request that the court conclude, after a review of all the evidence, that the State has failed to prove beyond a reasonable doubt the identity of Emilie Lounsberry as the person who is in violation of the court's orders.

Emilie Lounsberry has identified herself to the world, outside the courtroom in published articles, as a staff writer for The Philadelphia Inquirer. (P-5 Ev.). She has identified herself, outside the courtroom, by letters to jurors, as "the paper's legal affairs reporter" and as "the blonde woman sitting in the first row of the press section in the courtroom." (P-11, 13b, 14b and 15b-Ev.) These identifications have been offered and accepted into evidence without objection.

Lounsberry is one of four reporters in this case and its only female. A female reporter called juror Karsner and left a message. Karsner called the telephone number the female reporter

had left in order to leave the message described in DL-1 Ev. A female reporter returned Karsner's call and identified herself as Lounsberry. This reporter stated that she was only doing her job, but advised the juror to give her a call if she changed her mind. The circumstances are such that this court cannot conclude that this is the handy work of some stranger to the case. How can a stranger return such a telephone call. There are no other female reporters in the case which could give rise to some question of identity.

Circumstantial evidence oftentimes is more certain than direct evidence, and this is that case as far as the question of identification is concerned. Further, the testimony shows that Ott delivered Lounsberry's letter to Darnell and Anastasia delivered her letter to Woods, the stepfather of Darnell. These two reporters are part of the group and quite neatly tied together from their own writings and that of Lounsberry. See underscored text in Lounsberry, *supra*. There are no strangers to these transactions who could create doubt as to who was involved. It is the opinion of the court that the State has shown beyond any doubt that Lounsberry was the person who contacted jurors, Karsner, Gilch and Darnell, all in violation of paragraph 15 of the court's orders.

As to respondent, George Anastasia, it has been shown beyond any reasonable doubt that he violated paragraph 15 of the court's order by attempting to contact juror, Nancy Karsner at her home in Voorhees, New Jersey, by leaving an envelope in which was the Lounsberry letter, and by presenting his business card (P-12 Ev.). As previously mentioned, Anastasia visited the New Jersey home of juror, Darnell, engaged in a conversation with witness Charles Woods, asked questions about Woods relationship with Darnell and asked questions about her residency and his desire to speak with her. Also, as previously mentioned, Woods asked Anastasia about his understanding of the court's order. It is clear from the evidence that the person with whom Woods was speaking was not the African-American staff writer, Ott, was not the female staff writer, Lounsberry, and was

not staff writer, Gambardello, who has been voluntarily dropped from the case because of the lack of any evidence of any activity on his part other than contributing to the article published on November 14, 2001, (P-5 Ev.), in violation of paragraph 13 of the court's order. What must be noted, is the fact that Anastasia left his business card with Woods (P-16, Ev.), which is identical to the one he left at Karsner's home. Business cards are not normally the property of another person and no evidence has been submitted which would suggest that Anastasia had sought the assistance of one of his colleagues in passing his cards out among the jurors, as was the obvious circumstance with regard to the Lounsberry letters.

From the totality of the circumstances presented to the court, the Attorney General, through his deputies, has shown beyond any reasonable doubt that Anastasia attempted to interview jurors who were involved in the Neulander trial, in violation of paragraph 15 of the court's order. This conclusion has been reached notwithstanding Woods' in-court misidentification of Anastasia, when he pointed to one of Anastasia's lawyers as the person with whom he was speaking on November 14, 2001. Business cards with one's name, telephone number, Fax number, e-mail address, the employer's name and street address on it, when coupled with published news articles identifying Anastasia as the writer, his being a member of a small specifically identifiable group, and when coupled with all of the other testimony of Anastasia's activities, is that type of evidence which is superior to a person's visual perception, which is subject to every human frailty possible, such as the stuttering and nervous witness who is asked to point to someone in a crowed courtroom who was observed six months previously. The identity of the respondents has been shown beyond any reasonable doubt.

VI

DRAWING THE LINE

This court has already concluded that the wording of the Orders was free of any ambiguity. The orders simply stated that members of the media were not to contact or attempt to inter-

view any juror, and later modified to change the description of the juror to that of a discharged juror. Where a person performs an act with total disregard for the meaning of an order which prohibits the doing of that act, it is absolutely reasonable to conclude that the person, with improper motive, intended to perform that act. In this case, it is obvious that the respondents weren't negligent, or their acts just happened without reason. The news articles, the written correspondence, the telephone calls, the knocking on doors, the waiting in cars with cameras, the multiple visits to jurors' homes and the persistent questioning of neighbors and relatives in an attempt to reach the jurors belie any assertion of lack of intent. The question is whether this conduct equals that type of intention which will support the charge of contempt against media personnel. It does. Some of the above conduct occurred on November 13, 2001, which was the day of the mistrial and the day before media counsel was to present argument to the court why the Orders should be modified or rescinded. The activity continued the following day while their attorneys were arguing before the trial court. The trial court, the Appellate Division, and our Supreme Court were never given the chance to rule prior to the respondents engaging in the prohibited conduct. The conduct of the media respondents imply that they are of the opinion that their haste to disseminate news, without more, is superior to a fair and reasonable judicial process, which has doors of emergency readily available to all members of the public. Furthermore, the respondents' conduct strongly suggests an arrogance which should not and must not be judicially digested. For to do so would be an abdication of the court's constitutional responsibility to maintain a viable, fair and operational judicial system for all the citizens of New Jersey, including those charged with the most heinous crimes. The respondents' arrogance and contumacious conduct cannot by this court be swallowed and digested. As previously stated, a line must be drawn somewhere. In *In the Matter of Felmeister*, 95 N.J. 431 (1984) and *In the matter of*

Carton, 48 N.J. 9 (1966), our Supreme Court has been instructive. As the Supreme Court stated in *Carton*:

> There must be no defiance of a court. .. It is no excuse that the trial judge may be in error. Courts of appeal exist to hear such claims. One who is dissatisfied with the action of a court must obtain a stay or obey the order. He may not ignore it.

48 N.J. at 16.

Further, as Mr. Justice Frankfurter stated in his dissenting opinion in *Pearce v. Comm'r of Internal Revenue*, 315 U.S. 543, 558, 62 S.Ct.754 (1942),

> In law as in life lines have to be drawn. But the fact that a line has to be drawn somewhere does not justify its being drawn anywhere. The line must follow some direction of policy, whether rooted in logic or experience. Lines should not be drawn simply for the sake of drawing lines.

The line that must be drawn here is that a citizen -- even one exercising First Amendment rights -- must obey an Order issued by a court of competent jurisdiction until such Order is declared, by the appropriate appellate tribunal, to be a nullity. The respondents' conduct in disregarding established principles of law can only be described as contumacious and far below the Primsoll line[1] established by our courts and cannot be permitted.

The respondents have wilfully, with the requisite specific intent and without regard for the consequences totally disregarded a court order. The Supreme Court's subsequent ruling, that paragraph 13 of Judge Baxter's Order is constitutionally infirm, does not absolve these respondents from their contumacious conduct.

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[1] *See, Fikes v. Alabama*, 352 U.S. 191, 199, 77 S. Ct. 281, 1 L.Ed. 2d 246, 252 (1957), *reh'g denied*, 352 U.S. 1019,77 S.Ct. 553, 1 L.Ed.2d 561 (1957).

VII
CONCLUSION

It is the opinion of the court that each respondent is guilty of contempt for violating paragraph 13 of Judge Baxter's order. It is the further opinion of the court that respondents Lounsberry, Anastasia and Ott are guilty of contempt for violating paragraph 15 of Judge Baxter's orders, as amended. Respondents are directed to appear before this court for sentencing as directed per the court's order of even date herewith.

[attachment]

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CAMDEN COUNTY

Docket No. L-7869-01

IN THE MATTER OF

JOSEPH GAMBARDELLO
GEORGE ANASTASIA
DWIGHT OTT
EMILIE LOUNSBERRY

CHARGED WITH CONTEMPT

ORDER FOR JUDGMENT OF CONTEMPT

This matter having come to the attention of the court by way of an Order to Show Cause filed by The Honorable Linda G. Baxter, the presiding judge of the Criminal Division, Camden County, and the court having heard testimony, received exhibits and the arguments of counsel and other cause having been shown,

1. It is on this 17th day of June, 2001, **ORDERED AND ADJUDGED** that each of the respondents is guilty of contempt of paragraph 13 of Judge Baxter's media Orders as amended, and

2. **FURTHER ORDERED AND ADJUDGED** that George Anastasia, Dwight Ott and Emilie Lounsberry are guilty of contempt of paragraph 15 of Judge Baxter's media Orders as amended, and

3. **IT IS FURTHER ORDERED** that each defendant appear before and in this court on June 20, 2002, at 9:00a.m., Court Room 62 for the purpose of sentencing.

/s/ Theodore Z. Davis
Theodore Z. Davis, P.J.Ch.

APPENDIX L

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CAMDEN COUNTY

Docket No. L-7869-01
Civil Action
[Filed: June 20, 2002]

IN THE MATTER OF

JOSEPH GAMBARDELLO
GEORGE ANASTASIA
DWIGHT OTT
EMILIE LOUNSBERRY

ORDER

Joseph Gambardello, you are hereby sentenced to a term of 180 days in the Camden County Department of Corrections facility, with 180 days of this sentence suspended on the following conditions:

1. You are to pay a fine of $1,000 to the Clerk of the court on or before 2:00 p.m., June 27, 2002.
2. You are to comply with the existing orders of the trial court as modified by the Supreme Court of New Jersey until the expiration of the earlier of the retrial of Mr. Neulander, the elapse of 180 days or as modified by an appellate tribunal.

Upon the breach of any of the terms of this sentence any remaining days shall be served in the Camden County Correctional Facility.

The above stated sentence is hereby stayed pending appeal.

/s/ Theodore Z. Davis
THEODORE Z. DAVIS, P.J. CH.

APPENDIX M

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CAMDEN COUNTY

Docket No. L-7869-01
Civil Action
[Filed: June 20, 2002]

IN THE MATTER OF

JOSEPH GAMBARDELLO
GEORGE ANASTASIA
DWIGHT OTT
EMILIE LOUNSBERRY

ORDER

George Anastasia, you are hereby sentenced to a term of 180 days in the Camden County Department of Corrections facility, with 175 days of this sentence suspended on the following conditions:

1. For five (5) consecutive days, excluding weekends, you are to participate in what is commonly referred to as the SLAP program on a Monday to Friday basis until the ten (10) consecutive days have been served.
2. You are to pay a fine of $1,000 to the Clerk of the court on or before 2:00 p.m., June 27, 2002.
3. You are to comply with the existing orders of the trial court as modified by the Supreme Court of New Jersey until the expiration of the earlier of the retrial of Mr. Neulander, the elapse of 180 days or as modified by an appellate tribunal.

Upon the breach of any of the terms of this sentence any remaining days shall be served in the Camden County Correctional Facility.

The above stated sentence is hereby stayed pending appeal.

/s/ Theodore Z. Davis

THEODORE Z. DAVIS, P.J. CH.

APPENDIX N

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CAMDEN COUNTY

Docket No. L-7869-01
Civil Action
[Filed: June 20, 2002]

IN THE MATTER OF

JOSEPH GAMBARDELLO
GEORGE ANASTASIA
DWIGHT OTT
EMILIE LOUNSBERRY

ORDER

Emilie Lounsberry, You are hereby sentenced to a term of 180 days in the Camden County Department of Corrections facility, with 170 days of this sentence suspended on the following conditions:

1. For ten (10) consecutive days, excluding weekends, you are to participate in what is commonly referred to as the SLAP program on a Monday to Friday basis until the ten (10) consecutive days have been served.
2. You are to pay a fine of $1,000 to the Clerk of the court on or before 2:00 p.m., June 27, 2002.
3. You are to comply with the existing orders of the trial court as modified by the Supreme Court of New Jersey until the expiration of the earlier of the retrial of Mr. Neulander, the elapse of 180 days or as modified by an appellate tribunal.

Upon the breach of any of the terms of this sentence any remaining days shall be served in the Camden County Correctional Facility.

The above stated sentence is hereby stayed pending appeal.

/s/ Theodore Z. Davis

THEODORE Z. DAVIS, P.J. CH.

APPENDIX O

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CAMDEN COUNTY

Docket No. L-7869-01
Civil Action
[Filed: June 20, 2002]

IN THE MATTER OF

JOSEPH GAMBARDELLO
GEORGE ANASTASIA
DWIGHT OTT
EMILIE LOUNSBERRY

ORDER

Dwight Ott, You are hereby sentenced to a term of 180 days in the Camden County Department of Corrections facility, with 170 days of this sentence suspended on the following conditions:

1. For ten (10) consecutive days, excluding weekends, you are to participate in what is commonly referred to as the SLAP program on a Monday to Friday basis until the ten (10) consecutive days have been served.
2. You are to pay a fine of $1,000 to the Clerk of the court on or before 2:00 p.m., June 27, 2002.
3. You are to comply with the existing orders of the trial court as modified by the Supreme Court of New Jersey until the expiration of the earlier of the retrial of Mr. Neulander, the elapse of 180 days or as modified by an appellate tribunal.

Upon the breach of any of the terms of this sentence any remaining days shall be served in the Camden County Correctional Facility.

The above stated sentence is hereby stayed pending appeal.

/s/ Theodore Z. Davis

THEODORE Z. DAVIS, P.J. CH.

APPENDIX P

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION
SALEM COUNTY

INDICTMENT NO. 01-04-170-I
A.D. #____

STATE OF NEW JERSEY

vs.

KENNETH W. POWELL,
Defendant.

PARTIAL TRANSCRIPT OF TRIAL

Place: Salem County Courthouse
92 Market Street
Salem, New Jersey 08079

Date: August 9, 2002

BEFORE: HonorableWilliam L. Forester, J.S.C. and Jury

(Requested portion begins)

* * * *

THE COURT: I've already shared with Counsel in chambers the following circumstance. That the jury foreperson has indicated that to spite an effort, and I know it's so that they made a considerable effort to reach a decision, that they are, in their words, hopelessly deadlocked.

I have explored with them, in the briefest of terms, if there's anything further I could do. I'm assured that there isn't, but I'll allow you to hear that from the jury itself.

They've had some additional time while we discussed the matter. Perhaps they've changed their view. And although it -- it pains me to consider a mistrial, that's -- that's where we are.

And if I thought any further annunciation of the law or any further time or any further effort by the jury would be profitable in reaching a unanimous verdict, I, of course, would cause that to occur, but it appears not.

But I'll let you hear that from the jury foreperson and the remainder of the jury for that matter.

So, Mr. Sheriff, could you have our jury come out, please.

(Jury enters the courtroom)

THE COURT: Counsel, Mr. Powell, ladies and gentlemen, be seated, be comfortable. And the alternates are here.

Ms. George, (phonetic), I've shared with the -- with Counsel, as well as with the alternates, the fact that you have disclosed, first, to the -- to the jury clerk and then to me that you are, and I -- using your words, that you were -- were, at the time of this note, hopelessly deadlocked.

First, let me ask you, is that still your position? You've had an additional, whatever it's been, 20 minutes while you graciously waited for us to gather. Is that still your position?

MS. GEORGE: Yes.

THE COURT: Okay. So I'll ask you, as well as all of the members of the -- of the jury, is there anything further that the Court could do in the sense that were I to repeat the instructions or go over the instructions again as to any of the definitions that -- that I've explained to you or any of the charges that I've explained to you or any of the law, in general, that wasn't specifically directed at a statutory charge, is there anything that I could do with regard to further explanation of the law that you feel might be helpful?

MS. GEORGE: No, not now.

THE COURT: Okay. And so say -- so say all of you? Let me ask you then further, then with respect to the law, as it was delivered to you, are you clear as to what it is that needed to be established, beyond a reasonable doubt, by the State, is that right?

MS. GEORGE: Yes.

THE COURT: All right. Specifically, your note says that we are hopelessly deadlocked on charges two and three. And, of course, two and three were vehicular homicide. Death by auto is count two. And count three is the aggravated assault.

In your note, which I believe is Court 3, which I'll mark that Court's Exhibit Number 3, that, of course, indicates to me that you were not hopelessly deadlocked insofar as the first charge is concerned, the manslaughter charge, is that right?

MS. GEORGE: Yes.

THE COURT: And with respect to it, you did reach a unanimous verdict as to it and what was that unanimous verdict?

MS. GEORGE: Not guilty.

THE COURT: Not guilty. And so say all of you?

ALL REPLY: Yes.

THE COURT: All right. I won't poll the jury under these circumstances. All have agreed that that was the -- that was the finding as to that charge.

Nothing further I could do, no further time? If I asked you to come back and be with us all next week --

MS. GEORGE: You could ask.

THE COURT: -- through Labor Day -- Labor Day, Halloween, say nothing like -- even if you were to stay, are you -- and I'm not trying to be humorous, but I'm suggesting to you that no further time, whether it be another day, another hour,

another week, none of that would help in your judgment, is that right?

MS. GEORGE: Yes.

THE COURT: And so say all of you?

ALL REPLY: Yes.

THE COURT: All right. Counsel, anything further?

MR. OSTROWSKI: Nothing, Judge.

MR. ROEDER: Yes, Your Honor. Pending a decision by the Prosecutor for a retrial, we wish that current bail be continued in this matter.

There also would be the issue of a new trial date. Is the Court benevolent to preliminary schedule a trial date at this point?

THE COURT: I'm prepared to schedule not a preliminary trial date, but a new trial date. Anything further?

MR. ROEDER: Yes. The gag order in this case, we continue to raise our concerns on that. The defendant really would wish to speak to all concerned about this issue. We wish to preserve our objections to the gag order at this point, Your Honor.

THE COURT: All right. Does the State wish to be heard on that latter point?

MR. OSTROWSKI: The only thing the State would like to say is the defendant certainly will have another opportunity to speak at court if he so chooses. That's when he can get his message out.

The State takes no position on the gag order. However, the only thing the State would request, consistent with our discussions in chambers, out of respect for the members of the jury as well as the alternates on the jury, I think all parties agree that the gag order should extend to the press from speaking with the jury.

THE COURT: Mr. Manganello?

MR. MANGANELLO: I would just indicate, Judge, if the State's indicating -- if the State's implying that there will be a retrial and that's why the defendant will have another opportunity to speak, we want that trial date today if that's at all possible to give us, Judge.

THE COURT: As soon as you sit down, you'll have it.

MR. MANGANELLO: Thank you.

THE COURT: I mean -- I don't mean that sarcastically, but we're ready to do that.

MR. MANGANELLO: Thank you, Judge.

THE COURT: All right. Two things. Preliminarily, first, I would be entirely remiss if I didn't express the genuine thanks from the -- from all the court personnel here for the way the jury has responded.

The State of New Jersey thanks you for your service, the County of Salem thanks you for your service.

Certainly, I'm convinced. I know what you were doing, and although I wasn't there to hear what you were doing, I know you asked for certain supplies. I know you gave it your best effort. And that is -- that is a credit to you.

I thank the alternates for their -- for their participation as well.

With considerable regret, I will declare a mistrial. With regard to the -- there were certain traffic summons, not very important in the scale of this matter, but nevertheless, that the Court heard testimony on.

Of course, I'm prepared to make a decision on that, but in light of the mistrial, I'm gonna reserve decision on the motor vehicle aspects of the case.

Indeed, I will continue the $50,000 bond that is presently in place pending a new trial. And I will empanel a new jury and commence a new trial on January the 6th, 2003.

With regard to the -- I have a certain reticence to calling it a gag order. I guess that's a slang term. I had entered an order

previously, as Counsel are well aware, precluding Counsel from having any discussion on the merits of the matter, anything other than procedural aspects with the press, with the media.

And the purpose of that, I suppose, has -- is abundantly clear, and that is, to ensure to the extent possible, that Mr. Powell and the State of New Jersey receive a fair trial.

Of course, I'm very mindful of the First Amendment, but I'm equally mindful of the Sixth Amendment, which guarantees a fair trial. And it is hard to have a fair trial when the case is first tried in the newspaper or in some other media.

I do also thank the media for their courtesies. You have your job to do and I have mine, but we have not crossed swords and I'm happy for that.

I'm gonna continue the gag order as it relates to -- well, it's already in place. Counsel are fully aware of it. But I'm gonna continue the order to preclude discussion by the -- by the media with the jury for exactly the same reasons as previously -- as previously stated. If this matter is gonna be tried again, the same principles that apply to Counsel would apply to the press -- to the jury rather as well.

All right. I also thank Counsel for being courteous to each other. We got off to a little rocky start here months ago, but all settled down to a dull roar. And I thank you for that.

MR. ROEDER: Your Honor -- .

THE COURT: Mr. Roeder, anything further?

MR. ROEDER: -- yes. I would hate to break with tradition of this trial, but there is one issue we would like to discuss at sidebar briefly.

THE COURT: Yes, please.

(Off the record sidebar)

THE COURT: Thank you for that. Ladies and gentlemen, again, with the thanks of the State of New Jersey and the County of Salem, the jury is excused and a mistrial declared. Thank you very much. We'll stand adjourned.

* * * *

(Requested portion ends)

CERTIFICATION

I, Rita F. Carelli, the assigned transcriber, do hereby certify that the foregoing is a partial transcript of videotaped proceedings in the Superior Court of Salem County, heard on August 9, 2002, Videotape dated same, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate record of the proceedings.

/s/ Rita F. Carelli
Rita F. Carelli (AOC #119)

Date: December 3, 2002

(2)

Supreme Court, U.S.
FILED
JAN 21 2003
OFFICE OF THE CLERK

No. 02-945

In the

Supreme Court of the United States

PHILADELPHIA NEWSPAPERS, INC.:
Petitioner,
v.
NEW JERSEY AND FRED NEULANDER,
Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of New Jersey

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, CBS BROADCASTING INC., COURTROOM TELEVISION NETWORK LLC, GANNETT CO., INC., NATIONAL BROADCASTING COMPANY, INC., THE NEW JERSEY PRESS ASSOCIATION, THE NEW YORK TIMES COMPANY, THE NEWSPAPER ASSOCIATION OF AMERICA, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE SOCIETY OF PROFESSIONAL JOURNALISTS, THE WASHINGTON POST COMPANY, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a professional organization of more than 800 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programming, as well as news and public affairs magazine shows, such as 60 MINUTES and 48 HOURS. CBS owns and operates broadcast television stations nationwide and, through a related company, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country.

Courtroom Television Network LLC ("Court TV"), a basic cable network, provides a window on the American system of justice through distinctive programming that informs and entertains. Court TV is 50% owned by AOL Time Warner, and 50% owned by Liberty Media Corp. The network reaches more than 75 million homes.

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[1] Pursuant to SUP. CT. R. 37.6, counsel declares that *amici curiae* authored this brief in whole. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief has been filed with the Clerk pursuant to SUP. CT. R. 37.3(a).

Gannett Co., Inc. is an international news and information company that publishes 94 daily newspapers in the US with a combined daily paid circulation of 7.7 mllion, including USA TODAY, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including USA WEEKEND, a weekly newspaper magazine with a circulation of 23.6 million. The company also operates more than a 100 web sites and a national news service. Gannett's 22 TV stations cover 17.7 percent of the US.

National Broadcasting Company, Inc. ("NBC") is a diversified media company that produces and distributes news, entertainment and sports programming via broadcast television, cable television, the Internet and other distribution channels. The NBC News division provides news and public affairs programming to more than 200 affiliated television stations across the country, including 14 stations that are owned and operated by NBC and that also separately produce and broadcast local news and public affairs programs. NBC also owns and operates the Telemundo Spanish-language television network and station group, the cable business news network CNBC, and MSNBC, a 24-hour cable news network that is jointly owned with Microsoft.

The New Jersey Press Association ("NJPA") is a not-for-profit organization of daily, weekly, and college newspapers published in New Jersey as well as corporate and associate members whose mission is to help member newspapers remain editorially strong, financially sound and free of outside influence.

The New York Times Company publishes The New York Times, a daily newspaper with a national circulation of 1.1 million daily and more than 1.7 million on Sunday. The company also owns The Boston Globe, The International Herald Tribune, as well as 16 regional newspapers and eight television stations.

The Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Radio-Television News Directors Association is the world's largest professional organization devoted exclusively to electronic journalism. Formed in 1946, RTNDA's membership encompasses more than 3000 news directors, news associates, educators, and students in more than 30 countries. From its inception, RTNDA has encouraged excellence in electronic journalism.

The Society of Professional Journalists is a voluntary nonprofit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

The Washington Post Company publishes The Washington Post, with a daily circulation of over 782,000 and a Sunday circulation of over 1.06 million.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court's order in this case severely restricts the First Amendment rights of the press and limits the exchange of information about the administration of justice in our society. The order upholding a prior restraint on the media is part of an alarming trend by courts toward blocking journalists from talking to jurors.

The public and the press rely on interviews of discharged jurors to explain the outcome of a particular trial, the experience of serving on a jury, and the operation of the judicial system. Such stories often lead to exposure of misconduct or abuse. All of this information comes from the unique perspective of a juror and cannot be obtained directly from other sources.

While there is no requirement that jurors must reveal their thoughts and impressions about a trial to the public, they certainly should not be barred from doing so if they wish to speak to the press. Nor should any member of the public — whether a member of the press or an ordinary citizen — be barred from merely asking.

The court order at issue is unprecedented. The New Jersey Supreme Court's order not only barred the media from contacting jurors, but also prevented jurors who wanted to speak from contacting the press. Such an order is an unconstitutional prior restraint warranting review by this Court.

ARGUMENT

I. THE COURT ORDER PROHIBITING JUROR INTERVIEWS BY MEDIA REPRESENTATIVES SHOWS A DISTURBING TREND OF UNCONSTITUTIONAL PRIOR RESTRAINT OF THE PRESS IN CASES OF GREAT PUBLIC INTEREST.

As this Court has recognized before, "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Because a prior restraint order has the effect of not only chilling, but freezing speech, a heavy presumption exists against its use. *Id.* at 558-59; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

The New Jersey Supreme Court order is a prior restraint that strikes at the heart of the First Amendment. The court's sweeping order prevents the media from interviewing all discharged jurors on any topic, even if an individual juror wants to speak with the press. Without the ability to gather information, the press is effectively censored.

Were this case anomalous, it would not be so alarming. Unfortunately, courts throughout the country have been chipping away at the public's ability to learn what is happening in its criminal justice system by issuing orders that prevent journalists from interviewing — or even identifying — discharged jurors. *Amici Curiae* are in a unique position to monitor this disturbing trend and strongly urge the Court to address it.

Many of these restraints on access to jurors come in those cases in which the public has the most interest. For example, in a products liability case against Bridgestone/Firestone, Inc. for defective tires, a district court judge prohibited journalists from contacting jurors without submitting a written application and receiving specific approval from the court. The judge issued the order to prevent juror harassment. *See* Bob Van

Voris, *5th Circuit OKs Shielding Jurors*, NAT'L LAW JOURNAL, Oct. 15, 2001, at A4. Jury deliberations were underway in the case when the parties settled, thus avoiding a verdict. *Id.* According to the National Highway Traffic Safety Administration, Firestone tires were linked to more than 192 deaths and 500 injuries as of September 2001. *See Engineering Analysis Report and Initial Decision Regarding EA00-023: Firestone Wilderness AT Tires*, U.S. Dep't of Transportation, Nat'l Highway Traffic Safety Admin., Office of Defects Investigation, October 2001. While hundreds of lawsuits had been filed over the defect, none had gone to trial. *See* Joyzelle Davis, Bloomberg News, *Jury Told Ford, Firestone Hid Flaws*, WASHINGTON POST, Sept. 12, 2002, at E3. Because these prior defect cases avoided trial through secret settlements, the public's interest in how this trial had proceeded and concern over tire safety issues was particularly great. However, the court's decision choked off a critical source of information from the discharged jurors who served.

In another instance, when jurors in Oakland, California awarded two environmentalists $4.4 million, the district court judge prohibited jurors from discussing the case with anyone other than family members until after the appellate process ends, which could take years. *See* Harriet Chiang, SAN FRANCISCO CHRONICLE, *Interviewing Jurors After Trials*, June 16, 2002, at A7, *available at* 2002 WL 4023070. Jurors found that the FBI and Oakland Police Department violated the constitutional rights of two environmental activists who were injured in a 1990 car-bomb blast by focusing on them as suspects and conducting illegal searches and seizures. *Bari v. United States*, Case No. 91-CV-1057 (N.D. Cal. June 11, 2002). While the court later vacated its order, the public was denied access to valuable information regarding the actions of public officials. *Id.*

In Texas, a judge overseeing the 2001 trial of Andrea Pia Yates, a mother who drowned her five children in a bathtub,

entered an order barring the news media from interviewing jurors in Yates's competency hearing or publishing any information about them. *See* Lisa Teachey, *Judge in Yates Trial is Asked to Allow Media Access to Jurors*, HOUSTON CHRONICLE, Oct. 4, 2001, at 28, *available at* 2001 WL 23633836. The issue before the court was of critical public importance: how does the judicial system decide whether an individual who admits to a heinous act is competent to stand trial for that crime? The order, initially barring all contact indefinitely, was later modified to limit contact with the jurors in the competency hearing until the conclusion of a subsequent criminal trial. *Id.* Nonetheless, the public was denied access to important information on how the courts handle insanity issues while the issue was the subject of nationwide debate and media attention.

In this case, the court order preventing journalists from talking to jurors is not only unconstitutional, but ludicrous in practice. Jurors are able to discuss cases with friends, neighbors, academics, criminal justice organizations, and even strangers — anyone but the media. This forces journalists to obtain this information indirectly by contacting third parties who have talked with jurors. Misinformation becomes more likely since the media are unable to receive first-hand information provided by jurors.

Even if jurors want to talk directly to the press and wish to initiate such contact, such action is prohibited. Yet these restraints on speech do not prevent jurors themselves from publishing information about their jury experience in books, articles or over the Internet. Such a result that targets and effectively censors the media is inconceivable in a democratic society. Indeed, "[o]ur liberty depends on the freedom of the press, and that cannot be limited without being lost . . . ." *Nebraska Press*, 427 U.S. at 548 (quoting 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1943)).

In light of the "immediate and irreversible sanction" of a

prior restraint order, review of this case is needed to prevent the inevitable chilling effect on speech. *Nebraska Press*, 427 U.S. at 559. Without review, an order such as this one places a journalist in an impossible position — facing either censorship or contempt charges. Even if orders limiting contact with discharged jurors are later found to be unconstitutional after a media challenge, journalists who interview jurors risk sanctions, including fines and jail time.

As numerous news organizations unfortunately have discovered, the First Amendment cannot always be used as a shield against an unconstitutional order restraining speech. It is important that this Court accept review so that future journalists are not sanctioned for exercising rights guaranteed by the First Amendment.

II. BANNING INTERVIEWS OF JURORS AND POTENTIAL JURORS PREVENTS NEWSGATHERING AND IS CONTRARY TO THE FIRST AMENDMENT RIGHT TO OPEN CRIMINAL TRIALS AND THE PUBLIC'S RIGHT TO RECEIVE INFORMATION.

A. This Court has recognized the public's interest in knowing how justice is administered, particularly in criminal trials.

Open judicial proceedings are fundamental to our legal system and our liberty. As a matter of constitutional, statutory and common law, courts have consistently held that judicial proceedings must be conducted in public.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the U.S. Supreme Court established beyond a doubt that the public and the press have a First Amendment right to open criminal trials. The Court stated that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Id.* at 573. Through open judicial

proceedings the press is able to provide public education and scrutiny of the judicial process.

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."

Nebraska Press, 427 U.S. at 559-60 (1976) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

Such openness must apply to all aspects of the trial, including access to jurors once they have been discharged. As the exclusive triers of fact, jurors are a crucial component of a criminal trial, vested with the authority to determine the guilt or innocence of the accused.

As such, the public has an interest in knowing about the jurors who serve as representatives of their community. "It is important for the public to receive information about the operation of the administration of justice, including information about the people who do render justice in the truest sense of the word." *United States v. Doherty*, 675 F.Supp. 719, 723 (D. Mass. 1987) (holding that under the First Amendment, jurors' names and address must be made public). By interviewing jurors following a trial, the press is able to discover and inform the public about the make-up of the jury. The district court order in this case is particularly troublesome because The Philadelphia Inquirer was investigating whether the jury forewoman was a Pennsylvania resident and should be sitting on the jury panel. The order prohibited the reporters from asking the juror to respond to this question after the first

trial had ended. Instead, the public is left questioning whether the jury was properly empaneled.

Jurors may want to speak with the press to respond to allegations of misconduct or public criticism of their verdict. As representatives of their communities, jurors have a right to speak freely with the press to inform the public of their thoughts regarding the trial for which they served. "'Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press. . . .'" *Near v. Minnesota*, 283 U.S. 697, 713-14 (1931) (internal citation ommitted). Permitting all other members of the public to speak with the press, but denying this same right to members of the jury, prevents the public from better understanding the judicial process through the experience of the actual jurors who rendered the verdict.

Banning interviews of jurors also deprives the public of information that may be cathartic for a community devastated by a crime. "When a shocking crime occurs, a community reaction of outrage and public protest often follows. (citation omitted). Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Richmond Newspapers*, 448 U.S. at 571. Juror interviews help the public better understand the outcome of a trial and provide "therapeutic value" to a community impacted by a criminal act. *Id.* at 570.

As this Court has recognized, "[t]he operation of the . . . judicial system itself . . . is a matter of public interest, necessarily engaging the attention of the news media." *Landmark Communications v. Virginia*, 435 U.S. 829, 839 (1978). Through juror interviews, the public can examine how the judicial system operates and how justice was administered by the jury. In this case, juror interviews could have helped establish that the judicial process was functioning properly in spite of the inconclusive verdict. In order for the judicial

system to keep the public's trust and maintain "confidence that standards of fairness are being observed," it is imperative that the public be able to obtain information from jurors about the trial and scrutinize its processes. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509 (1984).

In this sense, the timing of juror interviews is critical. In the instant case, the court's order effectively prohibited jurors from the first trial from speaking with the press for an entire year. This prior restraint of speech and "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also CBS Inc. v. Davis*, 510 U.S. 1315 (1994). While the court's order is not indefinite and prohibited interviews of discharged jurors from the first trial until after "conclusion of the retrial and return of the verdict," this is precisely the interval in which any possible misconduct should be brought to light. Pet. App. 2a. If the public is to have any faith in the administration of justice during the second trial, it needs to have confidence that if misconduct in the first trial occurred, it was exposed and resolved. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

B. Journalists use juror interviews to expose misconduct, educate the public, and serve as a check on the judicial process.

Under normal circumstances, a journalist is able to approach any person to ask about a matter of public concern. That person is free to speak or not speak to the reporter. Journalists rely on this same type of interaction with discharged jurors to provide the public with valuable information regarding the judicial system. To order journalists to refrain

from contacting discharged jurors destroys a critical newsgathering avenue.

The importance of juror interviews cannot be ignored. The most recent example of how juror interviews benefit the public can be found on the front page of the Jan. 5, 2003 issue of The New York Times. *See* Benjamin Weiser, A *Jury Torn and Fearful in 2001 Terrorism Trial*, N.Y. TIMES, Jan. 5, 2003, at A1. In this article, correspondent Benjamin Weiser used extensive juror interviews to report on the trial of four men who were convicted of conspiring with Osama bin Laden in the 1998 bombings of two American Embassies in East Africa. While the jury convicted these men of conspiracy, there were not enough juror votes to impose the death penalty.

By using juror interviews, the reporter provided the public with an understanding of what it was like to serve on a high-profile death penalty case of national importance. The article not only described the make-up of the jury, but the conditions under which the jurors worked. It also described the jury questionnaire used in a death penalty case, how each juror ranked the strength of their position regarding the death penalty on a 1 to 10 scale, and how each juror ultimately voted.

Interviews with jurors also demonstrated how they responded to making such an important decision regarding the execution of four convicted terrorists. Two jurors consulted pastors, in violation of the judge's directive not to seek outside advice. Another juror described how he feared retaliation by Islamic terrorists. And yet another juror explained how the court was confused over his position on the death penalty during jury selection. During these interviews, jurors were able to reflect on their decisions. The most vocal juror in favor of executing the defendants explained that in hindsight she was glad the jury did not vote in favor of the death penalty since the September 11 attacks may have been viewed as retaliation for their decision.

In addition to The New York Times, media organizations across the country rely on juror interviews to provide the public with valuable information retarding the administration of justice. For example:

- In Alabama, The Mobile Register relied on juror interviews to help explain the reason why a federal jury in a racketeering case against former police officers failed to reach a verdict. The article quotes one juror as saying at least two other panel members "had their minds made up" and were determined to acquit the defendants. While jurors favoring acquitting the police officers believed prosecutors failed to meet their burden of proof. Another juror described his frustration over the "reasonable doubt" instruction given to the jury. "I wish they had never written that in there," said the juror who favored convicting the defendants. *See* Joe Danborn, *Jurors: Holdouts Never Budged*, MOBILE REGISTER, Nov. 1, 2001, at A4.

- In Pennsylvania, The Philadelphia Inquirer described numerous conversations and contacts between jurors and associates of the defendants in a case charging six former narcotics officers of corruption. According to one juror, conversations between jurors and defendants and their family members in the federal building cafeteria were thought to be permissible because so many court employees were present. Other jurors commented that better efforts should have been made to separate the jurors from the six defendants and their numerous family members. "I think they really should have stressed to us, 'Don't ever look at them' . . . it was impossible to avoid anyone," said one juror. In spite of the contacts, two of the three jurors who voted against conviction said that these contacts did not influence their votes. *See* Emilie Lounsberry, *Five Squad Jurors Tell of Contacts During Deliberations*, PHILADELPHIA INQUIRER, Mar. 26, 1989, at A1; *see also* Daniel R. Biddle and Emilie Lounsberry, Five Squad

Jurors Seen Talking to Defendants, PHILADELPHIA INQUIRER, Mar. 9, 1989, at A1.

- In Louisiana, The Baton Rouge Advocate gained insight into why a jury awarded one million dollars to two retired police officers who filed complaints against the Baton Rouge Police Department for racial discrimination and harassment. According to one juror, the fact that two former police supervisors accused of using racial slurs and the police chief did not testify "was crucial to the jury's decision." *See* Michelle Millhollon, *Jury Finds for Retired Officers*, BATON ROUGE ADVOCATE, Jan. 15, 2002, at A1.

- In New York, Newsday interviewed jurors who responded to criticism by a defense attorney who said the jury was distracted by the defendant's Nazi tattoos. Instead, jurors "pointedly ignored the tattoos during deliberations" and focused on the weapon used to attack two Mexican laborers. *See* Andrew Smith, *Guilty of All Counts in Worker Beatings*, NEWSDAY, Aug. 17, 2001, at A5. In another case, Newsday interviewed jurors who explained the difficulty of imposing the death sentence in a case involving the brutal rape and death of a woman. "It was the most difficult decision we'll ever have to make. . . . It will live in our minds for years," said one juror. *See* Andrew Smith, *Jury Rules: It's Death*, NEWSDAY, Aug. 17, 2000, at A7.

An order preventing juror interviews would have prevented these articles from being written or published. If the Court does not accept review of this decision, it is likely that other judges will prohibit journalists from contacting discharged jurors. Such orders will prevent perhaps the most enlightening perspectives during a trial from being shared with the public. This effective censorship of both jurors and the press should not go unredressed. Indeed, "without some protection for seeking out the news, freedom of the press

could be eviscerated." *Richmond Newspapers*, 448 U.S. at 576 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

CONCLUSION

The order prohibiting media representatives from interviewing jurors, even when jurors initiate contact with the press, strikes directly at the protections provided by the First Amendment. Granting review of this order is necessary to provide clear guidance to courts regarding this important question of constitutional law. Accordingly, the petition for writ of certiorari filed by Philadelphia Newspapers, Inc. should be granted.

Respectfully submitted,

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